Supreme Court, U.S.
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No. 94-2012

In the

SUPREME COURT OF THE UNITED STATES

October Term 1995

In the Matter of DAVID B. JACOBS, an
Attorney and Counselor at Law

GRIEVANCE COMMITTEE
FOR THE EASTERN DISTRICT OF NEW YORK

Appellee,

v.

DAVID B. JACOBS, Esq.,

Petitioner.

Petition for a Writ of Certiorari to the
Second Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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9 pp

QUESTIONS PRESENTED

1. Whether the Federal Court acted without authority in law in that it proceeded on the basis of a void Order and Decision because the state court below did not have subject matter jurisdiction to determine the issues decided in the State Grievance Proceeding?

2. Whether the petitioner was entitled to an adversary proceeding including the right to subpoena and cross-examine witnesses in the federal grievance proceeding before the federal court could suspend the petitioner from the practice of law in the Federal Court?

3. Whether there were the necessary and sufficient grounds to suspend the petitioner from the practice of law in the federal court?

4. Whether the Order and decision of the Court of Appeals for the Second Circuit should be reversed and/or the question of subject matter jurisdiction of the Appellate Division of the Supreme Court of the State of New York to evaluate the dollar value of an attorney's legal work, labor and services within the construct of a grievance committee disciplinary proceeding be certified to the Court of Appeals of the State of New York?

PARTIES

The names of all parties to this proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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In the Matter of DAVID B. JACOBS, an
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GRIEVANCE COMMITTEE
FOR THE EASTERN DISTRICT OF NEW YORK

Petitioner,

v.

DAVID B. JACOBS, Esq.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SECOND CIRCUIT COURT OF APPEALS

Petitioner, David B. Jacobs, respectfully petitions for a writ of certiorari to review the Decision, final Order and Judgment of the Court of Appeals for the Second Circuit and/or to certify the question of the subject matter jurisdiction of the Appellate Division

of the Supreme Court of the State of New York to evaluate the nature and extent of an attorney's fee within the construct of a Grievance Committee disciplinary proceeding.

OPINIONS BELOW

The Decision, final Order and Judgment of the Court of Appeals for the Second Circuit affirming the petitioner's suspension appears at A-1. The final Order and Judgment of the Court of Appeals for the Second Circuit denying the petition for a rehearing appears at A-18 . The final Order and Judgment of the Federal Court Grievance Committee for the Eastern District Court of New York suspending the petitioner from the practice of Law in the Federal Courts appears at A-19. The decision of the Advisory Panel of the Federal Grievance Committee for the Eastern District Court appears at A-20 , containing the final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department, inter alia, suspending the petitioner from the practice of Law at A-22. The final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department denying the petitioner reconsideration, denying the petitioner leave to appeal to the Court of Appeals of the State of New York and directing the petitioner to vacate two confessions of judgment of record appears at A-37. The final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department denying the petitioner the opportunity to have an arbitration on the issue of the nature and extent of his earned attorney's fee appears at A-39. The final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department denying the petitioner the opportunity to (1) conduct an examination before trial of the complainant, Patricia Warmhold; (2) to obtain a bill of particulars from the complainant, Patricia Warmhold; (3) to obtain complete disclosure of all relevant and material information in the possession of the complainant and/or Grievance Committee for the

Tenth Judicial District; and (4) for an order directing that all further proceedings be stayed pending the determination of the instant motion, and if granted, for a stay pending completion of discovery appears at A-43. The final Order and Judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department authorizing the Grievance Committee to institute and prosecute a disciplinary proceeding appears at A-45.

JURISDICTIONAL STATEMENT

The Second Circuit Court of Appeals' Opinion in this matter was filed on December 23, 1994. A timely Petition for Rehearing was filed on January 7, 1995. The Court Of Appeals' denial of the Petition for Rehearing was issued on March 10, 1995 and is set forth A-10. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254 (1). This Court's jurisdiction is also invoked under Title 28, U.S.C. § 1257 (a) (1988) because the rules Judgment of the Appellate Division, Second Department of the State of New York sought to be reviewed of necessity draws into question the validity and/or application of Rule 4 of the General Rules of the United States District Court for the Eastern District of New York and §90 of the Judiciary Law of the State of New York on the grounds that it/they are repugnant to the Constitution of the United States.

As required by Rule 29.4(c) of this Court, Petitioner states that Title 28 U.S.C. § 2403 (b) (1988) may be applicable because this proceeding draws into question the constitutionality of a State statute.

CONSTITUTIONAL, STATUTORY AND COURT RULES INVOLVED

The constitutional, statutory and court rule provisions relied upon by the petitioner are the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; Title 28 U.S.C. §§ 2283

and 1983; Local Rule 4 of the General Rules of the United States District Court for the Eastern District of New York , §§ 4(a,d,g,and I); Article VI , §§1,2, 4k of the Constitution of the State of New York of 1894; Article I , §§1,2, and Article VI, §§ 28(c) and 30 of the Constitution of the State of New York; 1848 New York Laws ch. 379,448; New York State Judiciary Law §§ 83, 90(2),

STATEMENT OF THE CASE

This appeal arises out of the Order and Judgment of the Second Circuit Court of Appeals, [A-1] which affirmed the undated Order of the Grievance Committee consisting of and signed by Judge Thomas C. Platt, Judge Leonard Wexler, Judge Reena Raggi and Judge Arthur D. Spatt of the U.S. District Court For the Eastern District of New York [A-19] based on the decision of the Advisory Panel to the Grievance Committee for The Eastern District of New York, signed by Judge Frederick B. Lacey, Judge Milton Mollen and Judge Owen McGivern, [A-20]. That Order and decision [A-19] suspended the Petitioner from the practice of law in the Federal Courts for the same period of time, three years, that the Petitioner was suspended from the practice of law in the state courts by the Appellate Division of the Supreme Court of the State of New York.

Jurisdiction of the Federal Court for the Eastern District of New York to bring on the proceeding by the initial Order to Show Cause, dated, April 6, 1993, by Judge Thomas C. Platt, sua sponte, was apparently made pursuant to Rule 4 of the General Rules for the United States Courts for the Eastern and Southern Districts of New York. Judges Platt, Raggi and Spatt issued a final Order, [A-19] which was appealed to the Second Circuit Court of Appeals. The bases for the appeal to this Court are that the court below erred in its decision and Order because it was based on 1) a State Court decision that was void for want of subject matter jurisdiction, 2) Federal Grievance Committee procedures that were defective in that they did not provide the petitioner with an adversary proceeding or hearing, and 3) violations of the Petitioner's

constitutional rights under the 5th, 6th, 7th, 8th and 14th Amendments to the U.S. Constitution and 42 U.S.C. 1983 both in the Federal Grievance and the State Grievance proceedings.

STATEMENT OF FACTS

Judge Platt of the Federal District Court for the Eastern District of New York issued an Order, sua sponte, dated, April 6, 1993, directing the Petitioner to show cause why the Petitioner should not be suspended from practicing law in the Federal Courts in any form, either principal or agent, apparently based on the Appellate Division of the Supreme Court of the State of New York's decision and Order, dated, March 8, 1993, (A-22) suspending the Petitioner from the practice of Law in the State of New York for three years.

The Petitioner requested a hearing pursuant to Rule 4 (a), (d), (g), and (i). Judge Platt ordered a Grievance Committee hearing and assigned Judge Frederick B. Lacey, Judge Milton Mollen and Judge Owen McGivern as the members of the Grievance Committee. This "Committee" was later to be known as an "advisory panel" and was not the "Grievance Committee" that signed the final Order that was appealed to the Second Circuit Court of Appeals. No notice and no distinction was ever made known to the Petitioner that the panel chosen by Judge Platt was different in function or person from the Federal Grievance Committee that was later discovered to be made up of Judges Platt, Raggi, Wexler and Spatt. These latter Judges only input into the proceedings was to sign the Order suspending the Petitioner

No statement of any charges and no complaint was ever served upon the Petitioner in advance of meeting with the Grievance Committee advisory panel.

The panel of Judges and the Petitioner met three times in 1993; on August 17, 1993, on October 25, 1993 and on November 11, 1993. At the first meeting, on August 17, 1993, only Judges

Lacey and Mollen were present representing the Grievance Committee panel. At the second meeting, on October 25, 1993, Judges Lacey, Mollen and McGivern were present. No Court Reporter or recording device was used to record either meeting. No exhibits or evidence was marked. No sworn testimony was taken. No adversary, representing the Federal District Court Grievance Committee, was assigned. Almost identical discussions took place at the first two meetings, namely, the Petitioner was asked to explain a) the basis for the Petitioner's belief that he was entitled to a hearing, b) the kind of a hearing the Petitioner was entitled to, c) the nature and quality of the evidence that the Petitioner intended to put forth at the hearing and d) who should be chosen as the Petitioner's adversary at the hearing.

On November 3, 1993, the Petitioner wrote to Judge Platt asking him to hold a conference because it had been almost four months since he had issued his directive to hold a hearing, Judge Platt held a conference on November 8, 1993. Judge Platt said that he had submitted information to the panel and that it was the panel's discretion whether further "testimony" was necessary or not. Judge Platt said the Committee would meet again with the Petitioner. Judge Platt said that it was the Petitioner's burden to prove, by "clear and convincing evidence", his contentions at the hearing. Judge Platt also said in response to the Petitioner's request for information on the "adversary" that, "you don't have one at the moment, except yourself,". The Judge then proceeded to state that the panel, at their discretion, may give the Petitioner an evidentiary hearing. Judge Platt then said the Petitioner is getting an evidentiary investigation and hearing.

The Petitioner produced subpoenas for signature to compel attendance of witnesses. They were refused by Judge Platt , who said, "If an evidentiary hearing was granted by the advisory panel, and if the panel did not sign the subpoenas, that the Petitioner should appear before Judge Platt with the Subpoenas for his signature."

At the November 11, 1993 meeting of the advisory panel to the Federal Grievance Committee there was a Court Reporter

none of the exhibits were offered into evidence. No sworn testimony was taken, no adversary was present and no witnesses were called. During that meeting the Judges said that the proceeding was not an adversary proceeding. At the end of that meeting the advisory panel "reserved decision". In an opinion dated December 30, 1993, the advisory panel concluded that an evidentiary hearing would not be needed to determine whether the federal grievance committee should impose discipline on the basis of the state order. The panel went on to find that the state proceeding had been fair and free of constitutional infirmity and recommended that the federal grievance committee suspend Jacobs from practice in the federal district court. In an order issued on January 31, 1994 and signed by all four Federal Judges, Platt, Raggi, Wexler and Spatt, the federal grievance committee adopted the opinion of the advisory panel. The "Advisory Panel's" decision, contains numerous references to a hearing transcript (HT's) that was not marked as an exhibit nor marked in evidence. It was never made part of the record of this case and is not included in Petitioner's appendix. The Order of suspension from Federal Court practice. The District Court's Order and Decision was appealed to the Second Circuit Court of Appeals and affirmed by that court. This Petition for Certiorari followed.

PRIOR UNDERLYING FACTS IN STATE GRIEVANCE PROCEEDING

The underlying state disciplinary action arose out of a complaint by Patricia Warmhold to the Grievance Committee for the Tenth Judicial District of the Appellate Division of the New York State Supreme Court, Second Department (state grievance committee). Jacobs had represented Warmhold from 1987 and 1989 in multiple family court proceedings and a divorce proceeding.

Twice during their attorney-client relationship, the Petitioner had been fired by the complainant. Twice during their attorney-client relationship, the Petitioner in good faith allowed himself to be rehired to continue to perform legal services for the

complainant. At no time has the Petitioner receive payment for any of the legal services performed for the complainant. To secure the Petitioner's legal fees, the Petitioner and the complainant entered into a mutual agreement for the payment of legal fees already earned by the Petitioner. Two promissory notes and two confessions of judgment were discussed, reviewed and then signed, notarized and acknowledged by the complainant, one in 1987 and another in 1988. After approximately three years of providing legal assistance to the complainant, and almost a year and a half after the second confession of judgment was negotiated and filed in the County Clerk's Office, the Petitioner obtained an Order of Withdrawal from both the matrimonial action and the Family Court proceedings. Only then did the ex-client complain to the Grievance Committee. To date the complainant has never testified or reported that the fee charged was excessive or unreasonable. The only claim the complainant has made to date is that the Petitioner did not inform the complainant-defendant that she, herself, was responsible for paying the Petitioner's fee.

The state grievance committee initiated an investigation and deposed Jacobs in November 1989. Based on its investigation, the committee charged that (1) Jacobs had overbilled Warmhold on two occasions, (2) he had wrongfully obtained from her and filed in the Office of the Nassau County Clerk two confessions of judgment and (3) he had improperly attempted to limit his own malpractice liability. The committee then brought a petition against Jacobs to the Appellate Division. In May 1991, the Appellate Division appointed a special referee to hear evidence and make a report. The referee held five hearings from June to November 1991, at which Mrs. Warmhold was the only witness called by the state grievance committee. Jacobs testified in his own behalf and called only one other witness.

In June 1992, the referee sustained the charges of misconduct against Jacobs. The state grievance committee then petitioned the Appellate Division to confirm the report of the referee. In an Opinion and Order dated March 8, 1993, and

reported at 188 A.D.2d 228, the Appellate Division confirmed the report and suspended Jacobs from practicing law for a three-year period commencing April 12, 1993. In imposing this sanction, the court took into consideration three prior disciplinary actions it had taken against Jacobs, two in 1986 and one in 1990. The court further ordered that Jacobs vacate the confessions of judgment against Warmhold. Jacobs's application for permission to appeal to the New York State Court of Appeals was denied. 82 N.Y.2d 681 (1993). On April 6, 1993, Chief Judge Thomas C. Platt of the United States District Court for the Eastern District of New York, as chairman of the grievance committee for that court, initiated, sua sponte the Order to Show Cause described above, why Jacobs should not be suspended from practice in federal court during the period of his state suspension. This appeal followed.

. The petitioner contends that he was deprived of his property and liberty without authority of law. This position is based on the fact that the Federal Grievance Committee's decision was void because it was a) in contravention of the Petitioner's due process rights to an adversary proceeding and b) based on a void decision of the State court because it lacked the constitutional and/or statutory authority to hear, evaluate and determine the issue of an attorney's fee within the construct of a disciplinary grievance committee hearing.

REASONS FOR GRANTING CERTIORARI

To the Petitioner's knowledge his is the only reported federal or state case that could affect every attorney in the United States by permitting a State or Federal Grievance Committee to value of all an attorney's work in progress, and provide for a grievance committee disciplinary proceeding as a forum to evaluate any attorney's fee that is called into question, either sua sponte, by the court, or Grievance Committee by virtue of a client's complaint for charging an alleged excessive fee. The important issues raised by this case are as:

a) Whether any court may rely on or use, for any purpose, another court's decision or judgment that is challenged as void for want of subject matter jurisdiction without first determining the threshold question of jurisdiction;

b) Whether the Petitioner was entitled to an adversary proceeding before the Federal Grievance Committee, itself, with the right to subpoena witnesses, give testimony and offer evidence;

c) Whether the Federal Grievance Committee may delegate to an "Advisory Panel" the responsibility to make findings and conclusions based on another court's decision or judgment that is challenged as void for want of subject matter jurisdiction without first determining the threshold question of jurisdiction; and

d) Whether this Federal Grievance Committee Disciplinary Proceeding should have included an evidentiary hearing before the Petitioner could be suspended from the practice of law in the federal courts.

Underlying these issues is whether the Petitioner was entitled to a jury trial in the State Court to first determine the value and the reasonableness of the attorney's work, labor and services or whether the issues determinative of the value and the reasonableness of the attorney's work, labor and services involved may be resolved within the construct of a grievance committee disciplinary proceeding over petitioner's objection.

The far reaching consequences to the every member of the federal or state bar in affecting one's livelihood, and consequently what amounted to a confiscation of property, dictates that these issues raised be resolved by this Court..

A. The Federal Grievance Proceeding

The Petitioner submits that the acts of the Federal Grievance Committee (panel), Federal District Court and State Courts were in general, and as applied to the Petitioner, without subject matter jurisdiction, in excess of the power granted to it by a constitution or particular statute, and are therefore void. When court lacks jurisdiction of the subject matter or of the parties, its order, (A-1, 22) or judgment is a nullity and is void, and will be so treated when it comes in question either directly or collaterally, Kamp v. Kamp, 59 N.Y. 212, Risley v. Phenix Bank, 83 N.Y. 318, aff'd. 111 U.S. 125, 28 L.Ed. 374, 4 S.Ct. 22, Losey v. Stanley, 147 N.Y. 560, 42 N.E. 8. When a court acts without jurisdiction, the party aggrieved is entitled to direct and summary relief, Brookley v. Ives, 243 A.D. 487, 278 N.Y.S. 147.

A court's jurisdiction may be questioned in direct or collateral attack at any time, even for the first time upon appeal. When the Court's subject matter jurisdiction is challenged, the Court must make an inquiry into this issue before it can rely thereon, MacAffer v. Boston & M.R. Co., 268 N.Y. 400, 197 N.E. 328., Doey v. Clarence P. Howland Co., 224 N.Y. 30, 120 N.E. 53, cert. den. 248 U.S. 574, 63 L.Ed. 428. 39 S.Ct. 11. The petitioner questioned the subject matter jurisdiction of the Federal Court and the New York State Courts to entertain, evaluate and/or decide the issues attorney's claim for work, labor and services within the construct of a Grievance Committee disciplinary hearing and/or without a prior trial by jury. The petitioner questioned the subject matter jurisdiction of the Federal Court when no preliminary determination of the underlying State Court jurisdiction was made.

An attorney's claim for work, labor and services was, and is, enforceable by a suit at common law, for money damages only, called Assumpsit, now called Breach of Contract, Lynn v. Agnew, 179 A.D. 305, 166 N. Y. S. 274, judgment affirmed Lynn v. McCann, 123 N.E. 877, 226 N.Y. 654, Stevens & Cagger v. Adams, 23 Wend. 57, affirmed Adams v. Stevens & Cagger, 26 Wend. 451, Spencer v. Bush, 98 N.Y.S. 690, Werner v. Knowlton, 94 N.Y.S. 1054, 107 A.D. 158, Greenberg v. Jerome H. Remick & Co., 129 N.E. 211, 230 N.Y. 70, reversing judgment 181 N.Y.S.

987, 191 A.D. 947. That, as a matter of history and legal precedent, the issues of controverted fact within this claim were entitled to be tried and determined before a jury as a matter of right, Ward v. Orsini, 152 N.E. 696, 243 N.Y. 123, Werner v. Knowlton, supra, Steele v. Hammond, 121 N.Y.S. 589, 136 A.D. 667, Everitt v. Mitchell, 202 N.Y.S. 260. The Petitioner claims that the Appellate Division did not have subject matter jurisdiction, within the construct of a Grievance Committee disciplinary hearing, and/or without a prior trial by jury in a Supreme Court Trial Term, to 1) determine the Petitioner's right to a specific sum for work, labor and services performed, 2) direct the Petitioner to vacate judgments of record, 3) punish and penalize the Petitioner by bringing about a forfeiture of the Petitioner's law practice (approx. 80 civil cases in progress) and/or 4) prevent the Petitioner from obtaining employment in any category or subcategory of work in the law field. The Petitioner submits that the specific provisions of the New York State Judiciary Law, §90(2), and the Appellate Division Second Department Court Rules, Part 691.10, are unconstitutional in general, when used to determine or applied to an attorney's fee, and specifically as they were applied to the Petitioner.

The New York State Judiciary Law, §90 subd.(2) provides that the Appellate Division shall have original jurisdiction over the discipline of attorneys.

The courts, however, do not have the constitutional or statutory authority to enact substantive rules affecting an attorney's right to contract with his/her client with respect to fees, or be restricted in the manner of his compensation after suspension. The statutory power to discipline attorney's conduct is limited to censure, suspension or removal for professional misconduct, malpractice, fraud, deceit, crime, misdemeanor or conduct prejudicial to the administration of justice. It is found in Judiciary Law §90(2), which provides, in part:

> The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court, in each

> department, is authorized to censure, suspend from practice or remove from office, any attorney and counselor-at-law, admitted to practice, who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice ....

An attorney's right to be compensated for his/her services is also protected by the common law, In Re Britton's Will, 60 N.Y.S.2d 466, at 474, Kaplan v. Reuss, 495 N.Y.S.2d 404, 113 A.D.2d 184, affd 506 N.Y.S.2d 304, 68 N.Y.2d 693, Matter of Rosenblum, 503 N.Y.S.2d 605, 121 A.D.2d 546. The basic common law principle that one cannot do indirectly what one cannot do directly was not applied in this matter. The Federal Grievance Committee ought not to be permitted to rely on a state disciplinary proceeding that assumed subject matter jurisdiction over controverted facts for breach of contract where no jurisdiction was granted to the Appellate Division by the Constitution to hear and determine the issues, N.Y. State Const. of 1894 Art. 6 §§ 1, 2, 4k, Waldo v. Schmidt, 200 N.Y. 199, 93 N.E. 477, Re Pye, supra, Peterson v. Ocean Electric R. Co., 161 A.D. 720, 146 N.Y.S. 604, affd 214 N.Y. 43, 108 N.E. 199. The Appellate Division ought not to be permitted to delegate authority to a Referee to hear and determine suits at common law, when the authority to hear and determine the controverted fact issue was not granted to the Appellate Division.

When the issues in a case or controversy or special proceeding are triable by a jury, the Court must give the participants an opportunity to demand a trial of the issues involving controverted facts. In this matter the Petitioner was denied his right as guaranteed to him by the New York State Constitution Art. 1 §2.

The Petitioner submits, that a) the specific provisions of the N.Y.S. Judiciary Law, §90(2), and b) the Appellate Court Rules Part 691, violate and/or lack constitutional and statutory authority in general, when applied to determine an attorney's fee, or as

specifically applied to the Petitioner, to determine his attorney's fee within the construct of a disciplinary Grievance Committee hearing. Section 691.10 of Part 691 of the Appellate Division-Second Department Rules states in part:

> "§691.10 Conduct of disbarred, suspended or resigned attorneys; abandonment of practice by attorney.
>
> (a) Compliance with Judiciary Law. Disbarred, suspended or resigned attorneys at law shall comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary Law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.
>
> (b) Compensation. A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the bar. A disbarred, suspended or resigned attorney may be compensated on a quantum meruit basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client. Such applications shall be made at special term in the court wherein the action is pending or at special term in the Supreme Court in the county wherein the moving attorney maintains his office if an action has not been commenced. In no event shall the combined legal fees exceed the amount the client would have been

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required to pay had no substitution of attorneys been required."

It is submitted that the restrictions and limitation placed upon the amount of compensation due(limited to quantum meruit) and the manner in which the compensation is determined by virtue of this section are in direct conflict with the common rights of the Petitioner and section 474 of the Judiciary Law. The Petitioner, according to this Appellate rule, loses his contractual rights previously obtained with *all his client(s)* (Emphasis added) by virtue of his suspension. The Petitioner loses his right to a jury trial on the issue of his compensation being at once relegated only to quantum meruit. In the Petitioner's case, since the Appellate Division stated that the confessions of judgment were required to be vacated, and also stated the upper limit of what the Petitioner was entitled to, the State, acting through its political subdivision, the Court, also affected the substantive and procedural enforcement of the Petitioner's contractual rights. Again, these effects emanate from the results of a Grievance Committee disciplinary hearing that determined the very issue of the Petitioner's compensation. The Petitioner submits that these substantive and/or procedural restrictions emanating from the construct of a Grievance Committee disciplinary hearing violate the constitutional limitation on the State with respect to the impairment of the obligation of contracts. Such actions are in direct opposition to the Petitioner's right to a plenary trial to determine the issues of controverted fact by a jury in respect to the value of his services pursuant to his written contract.

In every case in which the Petitioner was the attorney of record, §691.1(b) limits the recovery of the Petitioner to only quantum meruit. In the Petitioner's view the State has no legitimate involvement because no public purpose is served and the State is not a party to the contract. Each client's legal fee should be determined by enforcing the retainer in a plenary trial where the controverted facts are determined by a jury.

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POINT TWO

THE FEDERAL COURT DID NOT FOLLOW ITS OWN RULES REQUIRED IN A GRIEVANCE COMMITTEE HEARING

The District Court for the Eastern District of the State of New York that rendered the decision and sentence denied the Petitioner due process of law in that it a) did not follow its own substantive and/or procedural rules to determine the case or controversy and/or fact issues raised therein, b) denied the Petitioner a hearing in advance of rendering the decision suspending the Petitioner and c) denied the Petitioner a jury trial on the issues of controverted fact. Furthermore, the District Court for the Eastern District of the State of New York did not have subject matter jurisdiction to impose the nature and extent of the penalty and forfeiture upon the Petitioner for the acts complained of without following its own rules and/or without a jury trial.

The District Court for the Eastern District of the State of New York is a Court of limited original jurisdiction. Its jurisdiction over attorneys emanates from the Federal Constitution. Rule 4 of the local Court rules of the Eastern District provides for the "Discipline of Attorney. Rule 4 is printed at A-14.

Judge Platt said that the Petitioner came under subdivision (d) of that rule. Subdivision (d) specifically states that,

> "If it appears, after notice and an opportunity to be heard..., the member may be disciplined by this court, in accordance with the provisions of paragraph (g)."

No notice and no opportunity to be heard has been afforded the Petitioner to date. No record was made of the first two

meetings with the panel. No adversary was ever selected. No exhibits were offered into evidence. No sworn testimony was taken. Subpoenas for witnesses were tendered and rejected by the panel. A transcript of a prior hearing was used to made the Federal Grievance Committee's decision that was not identified before the panel nor in evidence. The Petitioner's position is that the acts of the Federal Court through Judge Platt, the Federal Court's Grievance Committee and the "Advisory Panel" were void for either 1) complete lack of jurisdiction or 2) the Judge exceeded his jurisdiction. The Federal Court has, in substance, suspended the Petitioner for more than two years without a hearing.

In addition, the District Court is bound by it own rules, Matter of Thalheim, 853 F.2d 383 (5th Cir, 1988). Rule 4 (i) requires that there be a Complaint in writing regarding category Rule 4(d), described above, be directed to the Chief Judge. No complaint of this nature has ever been served upon the Petitioner. The Judge is bound to refer the complaint to the committee on grievances. To the Petitioner's information and belief, this was never done. No attorney from the panel was ever designated to investigate the allegations in the complaint. No statement of charges has ever been served on the Petitioner. Only an Order to Show Cause was served on the Petitioner. It contained no statement of any charges. The District Court violated both the spirit of, and the substantive and procedural intent, of its own rules to the prejudice of the Petitioner.

Since the only basis for Judge Platt's sua sponte Order To Show Cause was the State Court charges and proceeding, the following is presented as additional grounds as follows:

The Petitioner was denied his substantive and procedural due process rights under the 5th Amendment to the Constitution of the United States, New York State Constitution, Art. 1 § and under 42 U.S.C. §§1983, 1985.

A disciplinary hearing is an adversary proceeding. It is criminal in nature since it involves the loss of livelihood, In re Ruffalo, 390 U.S. 544, 551. Any ambiguity or doubt must be

resolved in favor of the attorney who is the subject of the disciplinary hearing, Erdmann v. Stevens, 458 F.2d 1205.

The New York State Constitution has a parallel provision, Art. 1 §2, that states that the right to a jury trial shall remain inviolate.

At common law, the cause of action for the value of legal work, labor and services was called Assumpsit. It required a jury trial. Since this right existed before the New York State Constitution was ratified, it must be afforded to the Petitioner.

The Court, in the case entitled, In Re Britton's Will, 60 N.Y.S. 466, declared, citing In Wilkins v. Carmichael (1 Doug. 101), and referring to Lord Mansfield, refers to this suit at common law as "a practice established upon general principles of justice, by which an attorney may obtain an order to stop his client from receiving money recovered in a suit in which the attorney was employed, until his bill is paid. It was introduced into the common-law courts from the Court of Chancery, Turwin v. Gibson, 3 Atk. 720, and like the practice of setting off judgments, and other equitable powers incident to courts of common law, it has always been a matter of equitable cognizance. The mistake lies in confounding a right to trial by jury,--which would exist if the attorney had brought an action against his client, and sought to obtain a judgment,--with a proceeding for an equitable application of funds under the control of the courts.

This latter quotation contains the important point to be considered, namely, whether a proceeding in effect is one at law to secure a money judgment or one in equity to enforce an equitable lien. When it is the latter, the matter is determined by the court without a jury. Matter of Goldin v. Duncan, 216 A.D. 472, 215 N.Y.S. 445; Matter of Pieria, 82 A.D. 466, 81 N.Y.S. 927, affirmed 176 N.Y. 566, 68 N.E. 1123; Matter of Popek's Estate, 157 Misc. 421, 283 N.Y.S. 758; Matter of Levine's Estate, 154 Misc. 700 , 278 N.Y.S. 36; Matter of Podell, 138 Misc. 6, 245 N.Y.S. 28; Machcinski v. Lehigh Valley R. Co., 2 Cir., 272 F. 920; and Application of Linder, D.C., 16 F.Supp. 605. The first part of §474 of the Judiciary Law provides the basis for the relation between the

attorney and his client, as follows: 'The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law.' An action by an attorney against his client on such an agreement or contract not connected with an application to fix and enforce a lien upon a fund in the court's jurisdiction, would be a simple action at law, triable by jury. That is the type of action differentiated in the quoted portion of Ackerman v. Ackerman, 14 Abb. Prac. 229 (1862). It may be that such was the type of action which the courts had in mind in the dicta above referred to. However, the Surrogate's Court never had and does not have jurisdiction over that type of an action. Matter of Lake's Estate 219 A.D. 530, 220 N.Y.S. 323; Matter of Smith, 111 A.D. 23, 97 N.Y.S. 171; and see Matter of Anderson's Estate, 136 Misc. 110, 240 N.Y.S. 532; and Matter of Post's Estate, 155 Misc. 389, 279 N.Y.S. 408."

The Petitioner was not afforded an opportunity for a jury trial at any stage of the proceedings on any issue of controverted fact. The Appellate Division not only delegated its alleged authority to a Referee to hear and determine all issues of fact, it permitted the Referee to evaluate the amount of the Petitioner's fee based on the Grievance Committee attorney's evaluation of the number of hours expended by the Petitioner. The Appellate Division also ordered the Petitioner to vacate the two judgments of record that had been duly filed and recorded in the Nassau County Clerk's Office. There is no authority, either constitutional or statutory that empowers the Appellate Division of the State of New York to vacate a Judgment of record within the construct of a grievance committee disciplinary proceeding. Without the opportunity for the Petitioner to have a trial by jury, the Appellate Division also caused a forfeiture of all of the Petitioner's legal cases in progress as part of its decision, restrained the Petitioner from engaging in any form of the practice of law for three years, and required the Petitioner to be tested on the code of professional responsibility as a condition of reinstatement.

It is the petitioner argument that the Court of Appeals decision at (A-10), specifically that:

Rule 4(i) does not entitle Jacobs to be served with the complaint triggering the federal disciplinary proceeding against him, is erroneous and that (A-11),

"Jacobs's claims that he was entitled to a full evidentiary hearing before the advisory panel, and his related claim that the panel should have enforced subpoenas at his request, finds no support in Rule 4 or in the requirements of due process. Rule 4(i) states simply that "[u]pon the respondent attorney's answer to the charges the matter will be scheduled for prompt hearing...." A simple hearing, at which an attorney sets out arguments in his defense, is not the same as a full evidentiary hearing, at which an attorney may elicit testimony and other factual support for his defense. The rule does not entitle a respondent attorney to a full evidentiary hearing where he has had ample opportunity to present evidence in the state proceeding, where the record of the state proceeding before the advisory panel is complete, and where the attorney has failed to show how new evidence would shed significant light on a claimed constitutional infirmity in the state proceeding."

echoed the "Advisory Panel" precluding the Petitioner in the Federal Grievance Proceeding from offering exculpatory evidence that was similarly excluded from the State Grievance Proceeding is also erroneous.

The Petitioner was denied his substantive and procedural due process rights under the 6th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. §§1983, 1985.

There was a lack of any reasonable standards or guidelines provided to enable the Petitioner to be on notice of the

requirement(s) for conduct for which the Petitioner was held answerable, in either the State Court proceeding or the Federal Grievance proceeding, Hurtado v. California, 110 U.S. 516 (1884), Connally v. General Construction Co., 269 U.S. 385 at 391(1926), Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 at 340 (1952), Sniadach v. Family Finance Corp. et al., 395 U.S. 337 (1969), Fuentes v. Shevin, 407 U.S. 67 (1972). Goldberg v. Kelly, 397 U.S. 254 (1970), Perry v. Sinderman, 408 U.S. 593 (1972), Goss v. Lopez, 419 U.S. 565 (1975), U.S. Const. Art. 1, §10, Ex Parte Garland, 4 Wall. 333 (1867), Calder v. Bull 3 Dall. 386 (1798).

The Petitioner was denied his Constitutional rights to confrontation and the use of subpoenas as guaranteed by 6th Amendment to the U.S. Constitution and parallel provisions in the New York State Constitution and 42 U.S.C 1983, because in the Federal Grievance Committee proceedings, the Committee

1) refused to authorize subpoenas for the presence of witnesses, including Dominick Pelle and the records of Pelle & Pelle, Esqs., the attorneys for the complainant's husband in both in the Supreme Court, Nassau County Matrimonial Action and in the Nassau County Family Court proceedings. The information demanded in the subpoena reflected the billing of Pelle & Pelle, Esqs. to the complainant's husband for the legal services rendered to him. The information that would have been provided by them was necessary to assist the Petitioner in proving the time and nature of the legal services performed by the Petitioner in connection with the matrimonial and Family Court proceedings of the complainant. That information was intended to help the Petitioner prove the services and the hours expended representing the complainant since there would be a direct correspondence regarding the appearances in both Courts for conferences, hearings and the like. Dominick Pelle, Esq.'s refusal to appear and the refusal of the Referee to enforce his own "So Ordered" Subpoena unduly prejudiced the Petitioner's defense since a) there was no other source available to the Petitioner for this information, Washington v. Texas, 388 U.S. 14 at p. 19, 1967, and b) an affidavit from Dominick Pelle, Esq.

submitted by Mr. Pelle, and accepted by the Referee and entered into evidence in lieu of Mr. Pelle's participation in the hearing. Mr. Pelle's statements in his affidavit were accepted as true on their face without ever subjecting him to cross-examination. The Petitioner was effectively precluded from exercising his right to question or cross-examine Dominick Pelle, Esq., a very damaging absent witness. The content of Dominick Pelle, Esq.'s affidavit was referenced by the Referee in his decision and the decision of the Federal Grievance panel also referenced this affidavit and

2) The Referee refused to permit the Petitioner to cross-examine the complainant with respect to a tape recording in which the complainant admitted 1) knowledge of the fees, and 2) that she was responsible for paying the fees.

The Petitioner, during his cross-examination of the complainant in the State proceeding was not permitted to interrogate the complainant with respect to all of the charges. A transcript of a tape recorded conversation between the complainant and the Petitioner was identified at the State hearing. This tape recording was previously listened to, examined, and its content agreed upon between the State Grievance Committee's attorney and the Petitioner. The tape recording of the conversation between the Petitioner and the complainant was made with the complainant's knowledge and consent. Both the testimony of the Petitioner and the Petitioner's witness, Dr. Gunsberger, bear this out. The Referee continually denied the Petitioner the opportunity to use the transcript of the tape recorded telephone conversation for purposes of impeachment during the Petitioner's cross-examination of the complainant. These actions on the part of the Federal Grievance Committee and the State Appellate Division violated the Petitioner's rights to a fair hearing and the right to effectively confront the Petitioner's accuser and main witness under the 5th, 6th and 14th Amendments to the U.S. Constitution and parallel provisions under the New York State Constitution, Mattox v. United States, 157 U.S. 237, 535, 536, (1895).

An additional 6th Amendment and procedural due process violation occurred when the Referee denied the use or entry of the

transcript of the tape recorded telephone conversation into evidence at the time when the complainant was on the witness stand. At the very end of the hearing, the defendant, Mr. Guido, the Grievance Committee's attorney, offered to permit the entry of the transcript of the tape recorded telephone conversation into evidence, as he put it, "To avoid any reversible error on appeal." The transcript of the tape recording was then admitted. The Referee then refused the Petitioner's request to recall the complainant to be cross-examined after the transcript of the tape was admitted into evidence. The Referee failed to permit the Petitioner the opportunity to effectively cross examine or confront the complainant. This nullified the impact of the cross-examination of the complainant during the hearing, by refusing to permit the Petitioner to use the transcript of the tape recorded telephone conversation for at least impeachment purposes. These actions on the part of the Referee and Appellate Division violated the Petitioner's rights to a fair hearing and the right to effectively confront the Petitioner's accuser and main witness under the 5th, 6th and 14th Amendments to the U.S. Constitution and parallel provisions under the New York State Constitution.

3) Including evidence of collateral acts involving the criminal representation of the complainant by the Petitioner, without prior notice to the Petitioner, and without the Petitioner being charged with any acts in connection therewith.

During the State hearing the complainant testified with respect to a criminal charge brought against her for aggravated harassment. The complainant was arrested and charged with using her telephone to make prank calls, harassing her husband's girlfriend over a period of months in 1987. The Petitioner also represented the complainant in that matter. Since the Petitioner was not charged with any acts which were the subject of that representation, this testimony by the complainant was a complete surprise to the Petitioner. The complainant's testimony in regard to this matter was offered and accepted by the Referee during the hearing. The Petitioner objected to the entire portion of the hearing concerned with this testimony, but was overruled. The Petitioner's substantive

and procedural rights were violated with the introduction into the hearing of prejudicial testimony completely extraneous to the charges.

4) Permitting, considering and using as one bases for the penalty imposed, the inclusion in the post-hearing motion to confirm the State Referee's report, prior involvements of the Petitioner with the State Grievance Committee, without any prior notice to the Petitioner or allowing the Petitioner the opportunity to defend and/or explain these prior involvements at the hearing.

The Grievance Committee attorney's post-hearing motion to confirm the Referee's report contained completely extraneous, prejudicial findings of the Petitioner's prior involvement with the Grievance Committee. These other matters that were submitted to the State Referee by the Grievance Committee bore no relation to the charges that were before the Referee. They were remote in time and circumstance and not related to the instant underlying charges. Their cumulative effect was and is prejudicial to the Petitioner in regard to their inclusion before the Appellate Division that stated it considered and included those past findings in setting out the three year suspension. They essentially were and are an attempt by the Grievance Committee to further charge the Petitioner in this proceeding with prior acts, some of which were not based on any hearing whatsoever. The prior incidents that were related in the Grievance Committee's post-hearing motion to confirm the report of the Referee completely undercut the principles of due process. Their inclusion in the Grievance Committee's post-hearing memorandum and/or motion to confirm the Referee's report violated the Petitioner's due process rights to a fair hearing since they were referred to and offered for consideration only after the hearing was closed without any opportunity for the Petitioner to offset their prejudicial effect, Washington v. Texas, 388 U.S. 14 at 19 (1967).

The Petitioner's substantive due process rights were violated in that nothing in the Referee's report to the Appellate Division and nothing in the Appellate Division's decision and order referred to or indicated any relationship between the Petitioner's prior

involvement with the Grievance Committee, the acts that form the basis for the charges, and the reason or reasons the charges were sustained or the measure of discipline imposed on the Petitioner. None of the prior incidents was ever discussed in terms of its nature and/or consequent involvement in the initial phase of the Grievance Committee's investigatory process. None of the prior incidents was ever discussed in terms of nature and/or consequent involvement prior to the service of any charges and specifications on the Petitioner.

No notice was given to the Petitioner that his alleged or actual prior acts would be a consideration in determining the sanction or punishment. In a disciplinary hearing, the attorney is entitled to prior notice that the disciplinary body would consider prior disciplinary action against the Petitioner in fixing his punishment. Failure to do so is a violation of due process, Sexton v. Arkansas Supreme Ct., Committee on Professional Conduct, 730 F. Supp. 285, Washington v. Texas, 388 U.S. 14, (1967). This should be especially true when the prior discipline did not result from a hearing.

The Petitioner claims that the defendants violated his constitutional rights under the 8th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. §§1983, 1985.

This argument specifically is that, as a result of the decision and order of the Appellate Division, the Petitioner was a) required to vacate the two confessions of judgment of record, punished and penalized bringing about a forfeiture of the Petitioner's law practice (approx. 80 civil cases in progress) and/or c) prohibited from obtaining employment in any category or subcategory or work in the law field as agent or principal within the construct of a Grievance Committee hearing and without a trial by jury. There was no specific finding made by the Referee or the Appellate State Court that the Petitioner violated:

a) Any rule, specific statute, law, and/or regulation;

b) Any recognized or codified standard with reasonable specificity;

c) Any moral, or ethical behavior or any conduct prescribed by law; or practiced

d) Any deceit, dishonesty, overreaching, undue influence with respect to the complainant.

The Petitioner was never charged with any of the above nor were these violations claimed or proven to have been committed by the Petitioner. Nothing that the Petitioner did was intended to harm. The Petitioner's only motivation was to secure payment for his services. The Petitioner is truly sorry if the complainant was harmed in any way by his actions. However, the evidence presented at the hearing indicated:

a) The complainant suffered no monetary loss,

b) The complainant's "credit" was never impaired from the time the first Confession of Judgment was filed to date,

c) The complainant suffered no other form of loss or impairment due to the Petitioner's representation of her to date,

d) The Petitioner negotiated with the complainant the value of his services and reflected this in the confessions of judgment, and

e) There was no evidence that the complainant paid the Petitioner anything for almost four years of legal services.

With respect to practicing before the Federal Courts, the Petitioner's argument is as follows: For a sanction to be validly imposed, the conduct in question must be in fact sanctionable under the authority relied upon. Such a sanction is tantamount to a criminal fine and penalty violative of due process, In re Yagman, 796 F.2d 1165, 1182-3 (9th Cir. 1986). A specific finding of bad faith, however, must precede any sanction under the Court's inherent powers, Roadway Express v. Piper, 447 U.S. 752, 764, 100 S.Ct. 2455, U.S. v. Hudson, 11 U.S. 32 (7 Cranch, 1812). No specific finding of bad faith was made with regard to this Petitioner by anyone to date. The Federal Courts must follow their own rules re discipline of attorneys. There must be a specific finding in the record. There must be a violation of sufficient gravity as to

evidence a lack of moral fitness to practice law. The Federal Court cannot assume that the court below made this finding. It must be clearly stated, Matter of Thalheim, 853 F.2d 383 (5th Cir, 1988). The charges must be sustained by clear and convincing evidence,- proof and the misconduct must be shown to have been fraudulent and the result of improper motive. There must be proof of intent. Suspension for three years entails the complete loss of livelihood, clientele with the consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and in his fellow lawyers, In re Fisher, 179 F.2d 361 at 369.

As stated above, no evidence was presented at the Petitioner's disciplinary proceeding and none was submitted to the Appellate Division to provide a basis for a specific finding by any court or judge that anything that was claimed or proven to have been done or not done by the Petitioner violated any

a) rule, specific statute, law, and/or regulation;

b) recognized or codified standard with reasonable specificity;

c) moral, or ethical behavior or any conduct prescribed by law; or practiced

d) deceit, dishonesty, overreaching, undue influence with respect to the complainant.

Without the ability to settle or try the pending cases, the Petitioner is now placed in the position of losing his livelihood because of these charges. No loss resulted to the one client involved. The measure of the penalty imposed involved the consideration of past acts for which the Petitioner had already been punished. This was in violation of the Petitioner's civil rights under the 5th, 6th, 7th and 8th and 14th Amendments to the Constitution of the United States and parallel provisions under the New York State Constitution, under 42 U.S.C. §1983, and U.S. Const. Art. 1, §10, Commonwealth ex rel. Wall v. Smith 345 Pa. 512, 29 A.2d 912, 913, Ex parte Flora, Ohio App., 31 N.E.2d 482, 485, Andrus v. Mcauley, D.C. Wash., 21 F. Supp. 70.

The Petitioner was denied among other protected rights, his substantive and procedural due process rights under the 14th Amendment to the Constitution of the United States and parallel provisions under the New York State Constitution and under 42 U.S.C. §§1983, 1985.

The Petitioner's 14th Amendment argument is that the United States Supreme Court and the lower Federal Court cases cited above and the basis for them, as described above, are binding on the Federal District Court for the Eastern District of New York and its Grievance Committee. The Petitioner's position is that they defendants violated and deprived the Petitioner of his constitutional rights under the 5th, 6th, 8th and 14th Amendments to the U.S. Constitution and the Petitioner's civil rights under 42 U.S.C. 1983 as described above. The Federal District Court for the Eastern District of New York and its Grievance Committee, all in their official capacities and/or their individual private capacities, either singularly or in concert, acted to deprive the Petitioner of his rights, including his civil rights without due process of law as described above. In essence the Petitioner is claiming that the loss of his clientele, livelihood (ongoing single practitioner with 80 active files), income, the stigma of suspension from practice, loss of all relationships with clients and colleagues, and loss of home through depletion of funds, was cruel and unusual punishment completely outside the bounds of reason and without any specific finding or immoral conduct. An added consideration is the fact that the Petitioner has never collected any remuneration from the complainant for over four years worth of work on her behalf.

The Court has, in effect, charged, determined guilt and punished the Petitioner with respect to acts that were and are in no way criminally or civilly wrong in nature or codified in law at the time that the Petitioner was alleged to have committed them. In effect the Court has defined a violation; imposed a sentence, penalty and forfeiture upon the Petitioner when no violation existed at the time Petitioner acted, denied him a jury trial under the guise of a disciplinary hearing; failed to permit the introduction of exculpatory

documentary evidence and/or call exculpatory witnesses for the Petitioner; denied the Petitioner access to exculpatory records; interfered with the parties' obligation clearly described and acknowledged in a contract for work, labor and services without a jury trial; and exacted a penalty from the Petitioner that bears no relation to the acts committed.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injuries an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue, Green v. McElroy, 360 U.S. 474 (1959). The Federal Courts have the power to review State Court disciplinary proceeding and decisions when the State Court procedure is wanting in due process, Matter of Gordon, 640 F.2d 1143, or when violative of 42 U.S.C. §1983, Getty v. Reed, 547 F.2d 971.When making the boundaries of criminal conduct the Court must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed, U.S. v. Gradwell, 243 U.S. 476, 485 (1917). No Court made a specific finding that the acts of the Petitioner were of sufficient gravity or that any act of the Petitioner showed a lack of moral fitness to practice law, Matter of Thalheim, supra. The Federal Grievance proceeding was not on the record, took not evidence and swore no witnesses. The panel acted as accuser, adversary, and decision maker. The case law, both federal and state, generally rejects the idea that the combination of judging and investigating functions is a denial of due process. A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness, 2 K. Davis, Administrative [sic] Law Treatise §13.02, p. 175 (1958)

CONCLUSION

The petition for a writ of certiorari should be granted.

May 25, 1995 Respectfully submitted,

DAVID B. JACOBS, pro-se
145 D Smith Street Apt. 1D
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516 868-4591

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 251—August Term 1994

Argued by Appellant pro se Decided: December 23, 1994
Submitted by Appellee
October 5, 1994

Docket NO. 94-6049

In the Matter of DAVID B. JACOBS,
an Attorney and Counselor at Law

GRIEVANCE COMMITTEE FOR THE EASTERN DISTRICT OF NEW YORK,

Petitioner-Appellee,

—against—

DAVID B. JACOBS, ESQ.,

Respondent-Appellant.

Before:

FEINBERG, MESKILL and MAHONEY,

Circuit Judges.

Appellant attorney was suspended from practice for three years following state grievance proceeding. The Committee on

Grievances of the United States District Court for the Eastern District of New York, under the procedure set out in its General Rule 4, suspended appellant from practice in that court for the same period. Appellant appeals from the Eastern District's order. The order is affirmed.

DAVID B. JACOBS, Woodbury, NY, *pro se for Respondent-Appellant.*

ZACHARY W. CARTER, Brooklyn, NY United States Attorney for the Eastern District of New York, (John Gleeson, David C. James, Assistant United States Attorneys for the Eastern District of New York, of Counsel), *for Petitioner-Appellee.*

FEINBERG, Circuit Judge:

In this appeal, David B. Jacobs challenges the procedure by which the United States District Court for the Eastern District of New York, pursuant to General Rule 4 of the United States District Courts for the Southern and Eastern Districts of New York (Rule 4), disciplines an attorney who previously has been disciplined by a state court in which he is admitted to practice. By order issued January 31, 1994, the Grievance Committee of the United States District Court for the Eastern District of New York (federal grievance committee), a four-judge committee chaired by the chief judge, suspended Jacobs from the practice of law in that court during his suspension by the Appellate Division of the New York State Supreme Court, Second Department. Jacobs appeals from that order, alleging constitutional infirmities in the state court order on which it was based as well as in the procedure followed by the federal grievance committee under Rule 4. For the reasons stated below we affirm the order of the federal grievance committee.

I. Facts and Prior Proceedings

The underlying state disciplinary action arose out of a complaint by Patricia Warmhold to the Grievance Committee for the Tenth Judicial District of the Appellate Division of the New York State Supreme Court, Second Department (state grievance committee). Jacobs had represented Warmhold in 1987 and 1988 in a divorce proceeding. The state grievance committee initiated an investigation and deposed Jacobs in November 1989. Based on its investigation, the committee charged that (1) Jacobs had overbilled Warmhold on two occasions, (2) he had wrongfully obtained from her and filed in the Office of the Nassau County Clerk two confessions of judgment and (3) he had improperly attempted to limit his own malpractice liability. The committee then brought a petition against Jacobs to the Appellate Division. In May 1991, the Appellate Division appointed a special referee to hear evidence and make a report. The referee held five hearings from June to November 1991, at which Mrs. Warmhold was the only witness called by the state grievance committee. Jacobs testified in his own behalf and called only one other witness.

In June 1992, the referee sustained the charges of misconduct against Jacobs. The state grievance committee then petitioned the Appellate Division to confirm the report of the referee. In an Opinion and Order dated March 8, 1993, and reported at 188 A.D.2d 228, the Appellate Division confirmed the report and suspended Jacobs from practicing law for a three-year period commencing April 12, 1993. In imposing this sanction, the court took into consideration three prior disciplinary actions it had taken against Jacobs, two in 1986 and one in 1990. The court further ordered that Jacobs vacate the confessions of judgment against Warmhold. Jacobs's application for permission to appeal to the New York State Court of Appeals was denied. 82 N.Y.2d 681 (1993).

On April 6, 1993, Chief Judge Thomas C. Platt of the United States District Court for the Eastern District of New York, as

chairman of the grievance committee for that court, ordered Jacobs to show cause why he should not be suspended from practice in that court during the period of his state suspension. On June 10, 1993, the Chief Judge appointed a three-member committee (referred to hereinafter as the committee of attorneys or the advisory panel) to assist the federal grievance committee. All three attorneys were retired judges. The advisory panel was to determine whether Jacobs should be suspended from practice in that court on the basis of his state court suspension. Under Rule 4, the federal grievance committee would follow the state order unless Jacobs showed by clear and convincing evidence infirmity of proof or of due process in the state proceeding, or that imposition of discipline by the district court would result in "grave injustice." For the convenience of the reader, we reproduce Rule 4 in full in Appendix A.

In response to the order to show cause, Jacobs sought to defend against suspension in the federal district court and to enjoin enforcement of the state court order of suspension. At a hearing before Judge Platt on June 9, 1993, Judge Platt refused to enjoin the state court order, stating that he lacked the authority to grant that relief.[1]

In a series of conferences with Jacobs beginning in August 1993, the advisory panel attempted to determine whether an evidentiary hearing would be needed in order for Jacobs to demonstrate constitutional infirmity in the state proceeding or grave injustice that would result from federal discipline. At a hearing held November 11, 1993, Jacobs suggested witnesses to be called at an evidentiary hearing. These proposed witnesses included Warmhold, the attorneys who had represented Warmhold's ex-husband in their

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[1] Jacobs has also initiated a separate action in the Eastern District, seeking injunctive and other relief from the state order. We take notice of an order issued by Judge Platt dismissing that complaint for failure to state a claim upon which relief may be granted. Jacobs v. Guido, No. 93CV-3566(TCP) (E.D.N.Y. Aug. 24, 1994). An appeal from that order has been filed in this court but has not yet been calendared.

divorce proceeding, the referee from Jacobs's state disciplinary proceeding and one or more judges of the Appellate Division. The advisory panel found that the information that might be learned from each of these potential witnesses either was already in the record of the state proceeding, could have been presented there or would add little of relevance.

In an opinion dated December 30, 1993, the advisory panel concluded that an evidentiary hearing would not be needed to determine whether the federal grievance committee should impose discipline on the basis of the state order. The panel went on to find that the state proceeding had been fair and free of constitutional infirmity and recommended that the federal grievance committee suspend Jacobs from practice in the federal district court. In an order issued on January 31, 1994 and signed by all four judges, the federal grievance committee adopted the opinion of the advisory panel. This appeal followed.

II. Discussion

Jacobs argues that the state disciplinary proceeding violated the federal and New York State constitutions. Jacobs urges us to enjoin enforcement of the state order and to reverse the federal grievance committee's decision based on that order. Additionally, Jacobs charges that certain aspects of the procedure followed by the federal grievance committee under Rule 4 violated due process.

A. Jurisdiction in this Court

As a preliminary matter, we consider our own jurisdiction to review the district court's decision to sanction Jacobs. A district

court's authority to discipline attorneys admitted to appear before it is a well-recognized inherent power of the court. See In re Snyder, U.S. 634, 643 (1985); Theard v. United States, 354 U.S. 278, 281 (1957). Precisely because this is an inherent, self-contained power of any court, the power of an appellate court to review a lower court's decision to sanction an attorney is not self-evident. In an early case, the Supreme Court was asked by a suspended attorney to grant a writ of mandamus to the lower court restoring the attorney "to his place of attorney at the bar" of that court. In denying the motion, Chief Justice Marshall observed that "[s]ome doubts are felt in this Court respecting the extent of its authority as to the conduct of the Circuit and District Courts towards their officers...." Ex Parte Burr, 9 Wheat (22 U.S.) 529, 530 (1824). Nevertheless, the Court in *Burr* left open the possibility that it might intervene "where the conduct of the Circuit or District Court was irregular, or was flagrantly improper." 9 Wheat (22 U.S.) at 530.

In the instant case, the order of the federal grievance committee does not at first blush appear to be the usual final decision, appealable under 28 U.S.C. § 1291, since it is not a decision of a single district judge, but rather a decision of the court's four judge grievance committee. It is possible to regard this case as an appeal under 28 U.S.C. § 1292(a) from the district court's denial of Jacobs's request for an order enjoining the state court disciplinary order. However, the notice of appeal states only that the appeal is from the opinion of the federal grievance committee and its order, and does not refer to Judge Platt's refusal (sitting alone) to enjoin the state order.[2]

Despite the perhaps metaphysical problem of "classifying" the nature of the appeal, this court had no difficulty more than a century after *Burr* in simply stating that "[t]he Circuit Courts have repeatedly entertained appeals from [attorney suspension orders], and their

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[2] As we have already noted, see note 1, Jacobs has brought a separate appeal from a later order of Judge Platt.

and their jurisdiction to do so has been assumed without discussion." In re Schachne, 87 F.2d 887, 888 (2d Cir. 1937) (citations omitted). The court proceeded to review the district court's determination for abuse of discretion. Id.; see also In re Chopak, 160 F.2d 886, 887 (2d Cir.), cert. denied, 331 U.S. 835 (1947).

The Supreme Court and circuit courts appear to have concluded that while regulation of attorney behavior should remain primarily within the discretion of each district court, it is contrary to fundamental notions of fairness to close off all avenues of review, even if only for the most glaring irregularities. Where a court has clearly abused its discretion to discipline an attorney, "some suitable appellate remedy" would have to apply. Thatcher v. United States, 212 F. 801, 804-05 (6th Cir. 1914), appeal dismissed, 241 U.S. 644 (1916). This court in *Schachne* apparently found this reasoning persuasive in confirming its own jurisdiction to review an order of a district court suspending an attorney. We find no reason to deviate from this well-established precedent.

B. The State proceeding

Despite Jacobs's failure to appeal from Judge Platt's June 1993 refusal to enjoin the state disciplinary order, he asks us to grant such an injunction. Putting to one side the jurisdictional question posed by Jacobs's notice of appeal, already discussed above, on this record we cannot enjoin enforcement of the state order. See Theard, 354 U.S. at 281-82; Selling v. Radford, 243 U.S. 46, 50 (1917). The New York State judiciary regulates the practice of law in the courts of the state, and generally federal courts must not interfere with its authority to do so. Even assuming that in an extraordinary case a federal court could conceivably intervene to correct a gross injustice by a state judiciary in regulating the practice of law in the state, this is not such a case.

We must still face the question whether the federal grievance committee could properly rely upon the state disciplinary proceeding

as a basis for taking similar disciplinary action at the federal level. The district court had to examine the state proceeding for consistency with the requirements of due process, adequacy of proof and absence of any indication that imposing discipline would result in grave injustice. Selling, 243 U.S. at 51; Rule 4(g).

Jacobs vigorously argues that the Appellate Division lacked subject matter jurisdiction over pivotal issues in his state disciplinary proceeding. Thus, Jacobs asserts that central to the state's decision to discipline him were findings regarding the fee he actually charged Warmhold and what fee he reasonably could have charged. Determination of his actual fee, Jacobs claims, is an issue on which New York State statutory and constitutional law entitle him to a jury trial. Absent a jury trial, according to Jacobs, the Appellate Division lacked jurisdiction to impose discipline on the basis of a finding regarding his actual fee. At oral argument in this court, Jacobs stated that he had presented this argument to the Appellate Division on a motion for reconsideration but that that court did not reach the issue. Nor did the federal grievance committee reach the issue. Jacobs's argument over the state-law limits on the authority of the Appellate Division to find facts in a disciplinary proceeding is obviously a state law issue that must be addressed to the courts of New York.

As to those issues properly before the federal grievance committee, the advisory panel found that the state proceeding was fair and free of federal constitutional infirmity. We agree with the panel's assessment of the state proceeding. Jacobs's claims of Fifth, Sixth and Eighth Amendment violations in the state proceeding are based on the groundless assertion that an attorney subject to a state disciplinary proceeding enjoys the full panoply of federal constitutional protections that apply to a criminal prosecution. His claim that the Seventh Amendment required a jury trial in the state proceeding rests on an equally flawed assertion that the Seventh Amendment applies to state as well as federal actions, see Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (I916), and that any action in which an attorney's fee is at issue

(including the state disciplinary proceeding against Jacobs) is a suit at common law, in which he is entitled to a jury trial.

For the reasons stated in the opinion of the advisory panel adopted by the federal grievance committee, we find no infirmity of proof or lack of due process in the state proceeding or risk of grave injustice that would prohibit the district court from suspending Jacobs on the basis of the state order.

C. Rule 4

In addition to alleging errors in the state proceeding, Jacobs challenges the Rule 4 procedure under which the federal grievance committee suspended him on the basis of the state order.

Under Rule 4(i), a complaint alleging that an attorney has been disciplined by another court (as specified in Rule 4(d)) is directed to the chief judge of the court. The chief judge in turn refers the complaint to the committee on grievances, which we have already referred to as the federal grievance committee. In this case, the committee was composed of Chief Judge Thomas C. Platt as Chairman and Judges Leonard D. Wexler, Reena Raggi and Arthur D. Spatt. The committee on grievances decides, with or without investigation, whether to pursue the charges against the attorney. If it decides to pursue the charges, the committee serves the attorney with a statement of charges and an order to show cause why the federal court should not impose discipline. Following the attorney's answer, a hearing before "a panel of attorneys" (the advisory panel) is scheduled. After the hearing, the panel submits its findings and recommendations to the grievance committee.

The attorney has the burden to show:
by clear and convincing evidence: (1) . . . that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that [the district] court could not consistently with its duty accept as final the conclusion of the other court; or (2) that

the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (3) that the imposition of discipline by [the district] court would result in grave injustice.

Rule 4(g). Failing such a showing, the federal grievance committee may discipline the attorney based on the other court's order. Rule 4(d). Such discipline may include suspension. Rule 4(g).

Jacobs's challenges to the procedure followed by the federal grievance committee may be summarized as follows. First, the grievance committee failed to follow its own rules by not serving him with the complaint that precipitated the federal disciplinary proceeding under Rule 4(i). Second, the order to show cause issued by the chief judge, with the Opinion and Order of the Appellate Division appended, did not constitute adequate notice of the charges against him. Third, the advisory panel's refusal to hold an evidentiary hearing denied him an opportunity to be heard. Finally, the chief judge's request that Jacobs refrain from practicing before the district court pending disposition of his case by the federal grievance committee denied him due process.

We address each of these claims in turn.

Rule 4(i) does not entitle Jacobs to be served with the complaint triggering the federal disciplinary proceeding against him. The rule states simply that "[c]omplaints in writing . . . will be directed to the chief judge. . . ." It says nothing about the form of a complaint and does not mandate that the complaint be served upon the respondent attorney. Indeed, it appears that the complaint referred to in Rule 4(i) may simply be a notification by the state grievance committee or the Appellate Division, similar to the notice that the federal district court is required to issue to other courts, under another provision in Rule 4, following its own imposition of sanctions. See, e.g., Matter of Sassower, 700 F. Supp. 100, 101

(E.D.N.Y. 1988), aff'd, 875 F.2d 856 (2d Cir. 1989) (describing event precipitating district court's issuance of order to show cause as "receipt . . . of notification of. . . disbarment").

Jacobs next claims that service upon him of Judge Platt's order to show cause did not provide him with adequate notice as it contained "no statement of any charges." This claim is also meritless. What Jacobs fails to mention is that appended to the order to show cause was the March 8, 1993 Opinion and Order of the Appellate Division. The Opinion and Order, which Jacobs surely knew about even before he received a copy from the chief judge, clearly sets out the charges against Jacobs. Rule 4(i) requires no more. Constitutional due process requires only notice "of such nature as reasonably to convey the required information." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The Opinion and Order of the Appellate Division certainly passes the *Mullane* standard.

Jacobs's claim that he was entitled to a full evidentiary hearing before the advisory panel, and his related claim that the panel should have enforced subpoenas at his request, finds no support in Rule 4 or in the requirements of due process. Rule 4(i) states simply that "[u]pon the respondent attorney's answer to the charges the matter will be scheduled for prompt hearing...." A simple hearing, at which an attorney sets out arguments in his defense, is not the same as a full evidentiary hearing, at which an attorney may elicit testimony and other factual support for his defense. The rule does not entitle a respondent attorney to a full evidentiary hearing where he has had ample opportunity to present evidence in the state proceeding, where the record of the state proceeding before the advisory panel is complete, and where the attorney has failed to show how new evidence would shed significant light on a claimed constitutional infirmity in the state proceeding.

With regard to the due process claim, we examine the advisory panel's decision not to hold a full evidentiary hearing

according to the balancing of private and public interests articulated by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Under *Eldridge*, we consider the private interest affected by the action of the federal grievance committee in following the state order without an evidentiary hearing, the risk of erroneous deprivation of that private interest, and the federal grievance committee's interest in foregoing an evidentiary hearing.

The private interest affected by the action of the federal grievance committee is Jacobs's right to practice law in the United States District Court for the Eastern District of New York. We appreciate the importance of this interest and the impact that suspension will have on Jacobs's ability to earn a living at his chosen profession.

However, the risk of erroneous deprivation of Jacobs's interest by failing to hold an evidentiary hearing is extremely low. Jacobs had an opportunity to present evidence to the special referee appointed by the Appellate Division and to appeal any errors in that proceeding to the Appellate Division. Furthermore, Jacobs had an opportunity to explain to the advisory panel appointed by the federal grievance committee how a new evidentiary hearing would enable him to carry his burden of proof under Rule 4(g). The Advisory Panel gave careful consideration to Jacobs's summary of the evidence he hoped to present, and found that the evidence Jacobs wanted to produce either was already in the record of the state proceeding, could have been put into that record or was of no significance. See Dixon v. Love, 431 U.S. 105, 113-14 (1977) (risk of erroneous revocation of driver's license absent evidentiary hearing not "significant" where licensee had opportunity to challenge disciplinary actions that were predicate for revocation). Upon review of the record, we find no evidence suggesting any appreciable risk that without an evidentiary hearing Jacobs might be erroneously deprived of his interest in practicing law in the district court.

Finally, the advisory panel had a clear interest in not holding an evidentiary hearing where Jacobs had made no showing that such a hearing would reveal an infirmity of proof or lack of due process in the state proceeding or risk of grave injustice from suspending Jacobs on the basis of the state order. An evidentiary hearing would require the grievance committee to expend valuable resources of time and effort on a proceeding which, based on Jacobs's statements to the committee at the November 11, 1993 meeting, would do no more than replicate Jacobs's state hearing or give Jacobs an unwarranted second opportunity to try the issues all over again.

Given the low risk of erroneous deprivation of Jacobs's interest in practicing before the district court and the important public interest in not expending judicial resources on a proceeding that would largely duplicate a prior state proceeding, we hold that the advisory panel's denial of Jacobs's request for an evidentiary hearing did not violate Jacobs's due process rights.

Finally, Jacobs apparently claims that Judge Platt's request that he voluntarily refrain from practicing before the district court pending disposition of his case by the federal grievance committee denied Jacobs due process. In June 1993, when Judge Platt asked Jacobs whether he would voluntarily refrain from practicing before the district court during the pendency of the federal grievance committee proceeding, Jacobs stated that he would not be prejudiced by such a concession and therefore agreed. Thus, although Jacobs initially objected to Judge Platt's request, he ultimately agreed to the proposed interim measure. Jacobs not only voluntarily complied with the request, but he also admitted that he would not be prejudiced by his compliance. The Advisory Panel ended its deliberations within five months. Under the circumstances, we decline to address Jacobs's argument on appeal that the district court violated due process by requesting that he refrain from practicing in the district court pending the outcome of the federal grievance committee proceeding.
We have considered all of appellant's arguments and they are without merit. We affirm the order of the federal grievance committee.

Appendix A

Rule 4. Discipline of Attorneys

(a) The chief judge shall appoint a committee of the board of judges known as the committee on grievances, which under the direction of the chief judge shall have charge of all matters relating to discipline of attorneys. The committee on grievances may entertain complaints in writing from any source. Complaints, and any files based on them, shall be treated as confidential. The chief judge shall appoint a committee of attorneys who are members of the bar of this court to advise or assist the committee on grievances. Members of this committee will investigate complaints, and will serve as members of hearing panels.

(b) If it appears, after notice and opportunity to be heard, that any member of the bar of this court has been convicted of a felony in any federal court, or in the court of any state, territory, district, commonwealth or possession, the member's name shall be struck from the roll of members of the bar of this court.

(c) If it appears, after notice and opportunity to be heard, that any member of the bar of this court has been convicted of a misdemeanor, in any federal court or in the court of any state, territory, district, commonwealth, or possession, the member may be disciplined by this court, in accordance with the provisions of paragraph (g)

(d) If it appears, after notice and opportunity to be heard, that any member of the bar of this court has been disciplined by any federal court or by the court of any state, territory, district, commonwealth or possession, the member may be disciplined by this court, in accordance with the provisions of paragraph (g).

(e) If it appears, after notice and opportunity to be heard, that any member of the bar of this court has resigned from the bar of any federal court or the court of any state, territory, district, commonwealth or possession while an investigation into allegations of misconduct by the attorney were pending, the member may be disciplined by this court, in accordance with the provisions of paragraph (g).

(f) If, in connection with activities in this court, any attorney is found guilty by clear and convincing evidence, after notice and opportunity to be heard, of conduct violative of the Codes of Professional Responsibility of the American Bar Association or the New York Bar Association from time to time in force, the attorney may be disciplined by this court, in accordance with the provisions of paragraph (g).

(g) Discipline imposed pursuant to paragraphs (c), (d), (e) or (f) may consist of suspension or censure. In the case of an attorney who is a member of the bar of this court, it may also consist of striking the name of the attorney from the roll. In the case of an attorney admitted *pro hac vice*, it may also consist of precluding the attorney from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order, and of the court's opinion, if any.

Discipline may be imposed by this court with respect to paragraphs (d) and (e) unless the member of the bar concerned establishes by clear and convincing evidence: (1) with respect to paragraph (d) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion of the other court; or (2) that the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (3) that the imposition of discipline of this court would result in grave injustice.

(h) If it appears, after notice and opportunity to be heard, that any lawyer not a member of the bar of this court has appeared at the bar of this court without permission to do so, said lawyer may be precluded from again appearing at the bar of this court. Upon the entry of an order of preclusion, the clerk shall transmit to the court or courts where the attorney was admitted to practice a certified copy of the order, and of the court's opinion, if any.

(i) Complaints in writing alleging that any member of the bar of this court is in a category described in paragraphs (b) through (e), or that any attorney practicing in this court has committed the misconduct referred to in paragraph (f), will be directed to the chief judge, who shall refer such complaints to the committee on grievances, which may designate an attorney selected from the panel of attorneys to investigate the allegations if it deems investigation necessary or warranted. If, with or without investigation, the committee on grievances deems that the charges require prosecution, a statement of charges shall be served on the attorney concerned together with an order to show cause why discipline should not be imposed. Upon the respondent attorney's answer to the charges the matter will be scheduled for prompt hearing before a panel of attorneys, which will report findings and recommendations. After such a hearing and report, or if no timely answer is made by the respondent attorney or if the answer raises no issue requiring a hearing, such action shall be taken as justice and this rule may require.

(j) Any attorney who has been suspended or whose name has been struck from the roll of the members of the bar of this court may apply in writing to the chief judge, for good cause shown, for the lifting of suspension or for reinstatement to the rolls. The committee on grievances shall act upon the application, either immediately or after receiving findings and recommendations from a hearing panel of attorneys to which the application has been referred.

(k) Misconduct of any attorney in the presence of this court or in any manner in respect to any matter pending in this court may be dealt with directly by the judge in charge of the matter or at said judge's option referred to the committee on grievances, or both.

(l) Whenever it appears that an attorney admitted to practice in the court of any state, territory, district, commonwealth or possession, or in any other federal court, has in this court been convicted of any crime or disbarred, suspended or censured the clerk shall send to such other court or courts a certified copy of the judgment of conviction or order of disbarment, suspension or censure, and a statement of the attorney's last known office and resident address.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the l0th day of March one thousand nine hundred and ninety-five.

Grievance Committee for the
Eastern District of New York,
Petitioner-Appellee,

v.

David B. Jacobs, Esq.,
Respondent-Appellant.

---Docket No.94-6049

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Respondent--Appellant David B. Jacobs.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN THE MATTER OF:

ORDER

DAVID BARNETT JACOBS

On the basis of and for the reasons stated in the Opinion of the Committee of Attorneys appointed by this Court's Committee on Grievances pursuant to General Rule 4(a), we conclude that Mr. Jacobs was afforded a fair hearing before and by the Appellate Division of the New York State Supreme Court for the Second Department and that there were no constitutional infirmities in the proceedings before the Appellate Division. Accordingly, we agree that Mr. Jacobs must be and he hereby is suspended from practicing law in this Court during the period of his suspension by the Appellate Division of the Second Department.

IN MATTER OF

OPINION

DAVID BARNETT JACOBS

By letter of June 10, 1993, (App. Ex. 1), Chief Judge Thomas C. Platt of the United States District Court for the Eastern District of New York ("the Court"), acting pursuant to the Court's General Rule 4, designated the undersigned Attorneys to assist the Court's Committee on Grievances, further stating as follows:

. . . In particular, we would like you to give David B. Jacobs, Esq. a prompt hearing to determine whether, in accordance with Rule 4(d), he should be suspended from practicing law in this Court as he has been by the Appellate Division for the Second Department and in particular to give him an opportunity to establish, if he can, b) dear and convincing evidence:

1. With respect to paragraph (d) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this Court could not consistent with its duty accept as final the conclusion of the other court; or

2. That the procedure resulting in the investigation or discipline of the attorney by the other court was to lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

3. That the imposition of discipline of this Court would result in grave injustice. Rule 4(g) (second para.).

In connection with the foregoing, I am enclosing the following:

1. A copy of our Order to Show Cause dated April 6, 1993.

2. A copy of Mr. Jacobs Notice of Cross Motion and Opposition to our Order to Show Cause.

3. A copy of the voluminous record before the Appellate Division, Second Department.

I have been advised that the Appellate Division has denied Mr. Jacobs' application for reargument and for leave to appeal to the Court of Appeals and there is pending in the New York Court of Appeals an application for leave to appeal which is under consideration by that Court.

I am sending a copy of this letter to Mr. Jacobs for his information.

As will be hereinafter discussed at length, the undersigned, after thorough review of the record, have concluded that Mr. Jacobs has not sustained his burden as to any of the aforesaid questions raised b) Chief Judge Platt's letter. Thus, we recommend that Mr. Jacobs be suspended from practicing law in the Court, as he has been by the Appellate Division of the New York Supreme Court for the Second Department.

THE OPINION OF THE APPELLATE DIVISION

On March 8, 1993, the Appellate Division rendered its opinion in the Disciplinary Proceedings instituted against Mr. Jacobs by the Grievance Committee for the Tenth Judicial District, as follows (188 AD 2d 228):

In the Matter of DAVID BARNETT JACOBS, an Attorney, Respondent. GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, Petitioner.

Second Department, March 8, 1993

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee for the Tenth Judicial District. Respondent was admitted to the Bar on June 20, 1979, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department. By order of this Court dated May 10, 1991, this Court referred the issues raised by the petition and answer to the Honorable Max Galfunt to bear and report. By order of this Court dated Kay 21, 1991, the Honorable Max Galfunt was relieved as Special Referee and the issues raised by the petition and answer were referred to the Honorable Moses Weinstein, to hear and report.

HEADNOTE

Attorney and Client -- Disciplinary proceedings
Respondent attorney, who charged a client clearly excessive fees and improperly obtained confessions of judgment for legal fees from his client, and who failed to provide his client with full and complete explanation of the character, effect and purpose of the confessions of judgment, is guilty of professional misconduct, and, taking into account his prior disciplinary history is suspended from the practice of law for a period of three years.

APPEARANCES OF COUNSEL

Frank A. Finnerty, Jr., Westbury (Robert P. Guido of counsel), for petitioner.

David Barnett Jacobs, Woodbury respondent pro se.

OPINION OF THE COURT

Per Curiam.

In this proceeding the respondent is charged with five allegations of professional misconduct. Charge One

alleges that the respondent has charged a client a clearly excessive fee, in violation of DR 2-106 of the Code of Professional Responsibility. On or about March 27, 1987, the respondent vas retained to represent a client in a matrimonial matter. On or about August 1987, the respondent charged his client $14,500 for legal services allegedly rendered by him in connection with her matrimonial matter. This $14,500 charged by the respondent included $2,500 in services rendered by the respondent in the form of various legal consultations conducted with his client between March 1984 and March 1987. The balance of $12,000 worth of legal services rendered was allegedly performed by respondent from March 28, 1987, through August 5, 1987, at a rate of $150 per hour, as set forth in the March 27, 1987 retainer agreement. The respondent actually performed no more than 34 hours of legal services between March 27, 1987, and August 8, 1987, therefore, entitling him, to no more than $5,175 pursuant to the retainer agreement.

Charge Two alleges that the respondent improperly obtained a confession of judgment for legal fees from, his client. On or about August 5, 1987, at the request of the respondent, the client signed a promissory note prepared by the respondent, evidencing a debt owed to the respondent in the amount of $14,500 for legal fees. On or about August 6, 1987, et the request of the respondent, the client executed an acknowledgment before a notary public, acknowledging the debt reflected by the note of August 5, 1987. On or about August 28, 1987, at the request of the respondent, the client executed a confession of judgment prepared by the respondent, confessing judgment in the respondent's favor against her in the amount of $14,500.00 based upon the promissory note. On or about August 31, 1967, the respondent filed the aforesaid confession of judgment in the office of the County Clerk t, Nassau County.

In obtaining the confession of judgment from his client, the respondent failed to first provide her with a complete and full explanation of the character, effect, and purpose of the confession of

judgment, including its effect upon her credit standing. The amount of the confession of judgment is not commensurate with, and in fact clearly exceeds, the value of the legal services that the respondent had rendered to his client as of August 5, 1987. The respondent wrongfully filed the confession of judgment to effect payment rather than holding it as' security for payment of his outstanding legal fees.

Charge Three alleges that the respondent improperly attempted to limit his liability to a client for his possible malpractice. The confession of judgment drafted by the respondent and signed by his client on August 28, 1987, states in part: "I am further releasing Mr. Jacobs from any liability that may ensue as a result of the action he is taking on any behalf." The respondent improperly obtained this release while his representation of his client was ongoing. The respondent improperly obtained the aforementioned release from his client without first fully apprising her of the facts pertaining to the representation that may give rise to specific claims against him. The respondent improperly obtained the release from his client without first advising her to secure independent counsel.

Charge Four alleges that the respondent has charged a client a clearly excessive fee, in violation of DR 2-106 of the Code of Professional Responsibility. On or about August 18, 1988, the respondent charged his client the sum of $10,000 for legal services allegedly performed by him in connection with her matrimonial matter between August 28, 1987, and August 19, 1988. The respondent actually performed no more than 43 hours of legal services on his client's matrimonial matter between August 28, 1987, and August 19, 1988, to which he was entitled to charge no more than the sum of $6,450 in accordance with the retainer agreement dated March 27, 1987.

Charge Five alleges that the respondent improperly obtained a confession of judgment for legal fees from his client. On or about August 18, 1988, at the request of the respondent, the client signed a promissory note prepared by the respondent, evidencing a debt

owed to the respondent in the amount of $10,000. On or about August 18, 1988 at the request of the respondent, the client executed an acknowledgment before a notary public acknowledging the debt reflected in the promissory note of August 18, 1988. On or about August 18, 1988, at the request of the respondent, the client executed a confession of judgment prepared by the respondent, confession judgment in the respondent's favor against her in the amount of $10,000. On or about September 15, 1988, the respondent filed the confession of judgment in the office of the County Clerk, Nassau County.

In obtaining the confession of judgment from his client, the respondent failed to first provide her with a complete and full explanation of the character, effect, and purpose of the confession of judgment, including its effect upon her credit rating. The amount of the confession of judgment is not commensurate with, and in fact clearly exceeds, the value of the legal services that the respondent had rendered to the client as of August 18, 1988. The respondent wrongfully filed the confession of judgment to effect payment rather than holding it as security for payment of his outstanding legal fees.

The Special Referee sustained the five charges of misconduct. The petitioner moves (1) to confirm the report of the Special Referee, and (2) to compel the respondent to take the necessary, and appropriate action to vacate the judgments obtained by confessions of judgment from his client. The respondent cross-moves to (1) disaffirm the report of the Special Referee, (2) deny the petitioner's motion to confirm the Special Referee's findings, (3) dismiss the charges against the respondent, (4) refer the matter to the arbitration panel located in Nassau County to arbitrate the fee dispute between the respondent and his client, or, (5) direct the Justice assigned to the complainant's matrimonial case at the Supreme Court, Nassau County, to conduct a hearing to determine the attorneys' fee the respondent is entitled to in the underlying divorce action and Family Court proceedings, and (6) stay the enforcement of any discipline penalty that may be determined by this Court pending: the resolution

of any final appeal, together with such other or further relief as this Court deems just and proper.

After a review; of the evidence, we find that Charges One through Five were properly sustained by the special Referee. We find the respondent's fees in both Charge One and Charge Four to be excessive and unsupported by the evidence. We further find with respect to Charge Three that the respondent improperly attempted to limit his liability to his client. With respect to Charges two and Five, we find that the respondent improperly obtained and filed confessions of judgment. The respondent failed to provide his client with a complete and full explanation of the character, effect, and purpose of the confession of judgment. Further, the amount of the confession of judgment exceeds the value of the respondent's services.

Accordingly, the petitioner's motion is granted in its entirety and the respondent is directed to vacate the judgments entered against his client. The respondent's cross motion is denied in its entirety.

In determining an appropriate measure of discipline to be imposed, we have taken into consideration the respondent's record of prior discipline, including 1986 Letter of Reprimand, a 1986 Letter of Caution, and a 1990 Letter of Admonition.
Accordingly, the respondent is suspended from the practice of law for a period of three years.

MANGANO, P. J., THOMPSON, BRACKEN, SULLIVAN and MILLER, JJ., concur.

Ordered that the petitioner's motion to confirm is granted in its entirety; and it is further,

Ordered that the respondent's motion to disaffirm is denied in its entirety; and it is further,

Ordered that the respondent David Barnett Jacobs, is suspended from the practice of law for a period of three years, commencing April 12, 1993, and continuing until the further order of this Court, with leave to the respondent to apply for reinstatement no sooner than six months prior to the expiration of that period of three years upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law, (b) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10), and (c) that he has otherwise properly conducted himself; and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent David Barnett Jacobs is commanded to desist and refrain (1) from practicing law in any form, either as principal or agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, Board, commission, or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding himself out in any way as an attorney and counselor-atlas; and it is further,

Ordered that the respondent is directed to vacate the judgments entered against his client.

MR. JACOBS ' NOTICE OF CROSS MOTION AND OPPOSITION TO THE COURT'S ORDER TO SHOW CAUSE

By this motion, Mr. Jacobs sought an order temporarily restraining "and/or staying any body from enforcing, and hereby suspending, the enforcement of the Order of the Appellate Division, dated March 8, 1993 . . .." This application was unsuccessful. Nonetheless, we have reviewed Mr. Jacobs' affidavit in support of that motion. See App. Ex. 2.

In his affidavit, Mr. Jacobs attacked the state court proceedings on the following grounds:

1. The Appellate Division decision omitted reference to hours of services provided by Mr. Jacobs to his client in the Nassau County Family Court (Aff. para. 4);

2. The Appellate Division, in sustaining Charges 1 and 2 against him, erred in finding that Mr. Jacobs performed no more than 34 1/2 hours of legal services between March 27, 1987, and August 5, 1987 (leading to that Court's determination that, for that period, the fee charged by Mr. Jacobs to his client vas excessive), (Aff. para 5);

3. The Appellate Division, in sustaining Charges 4 and 5 against him, erred in finding that Mr. Jacobs performed no more than 43 hours of legal services between August 28, 1987, and August 14, 1988 (leading to that Court's determination that, for that period, the fee charged by Mr. Jacobs to his client was excessive). (Aff. para. 6);

4. That the Appellate Division erred in holding that the filing of the confession of judgment was "to effect payment when the record reflects only the filing and not any act by Mr. Jacobs to effect payment" thereon, as charged in Charges Two and - . (Aff. para 8);

5. That the Appellate Division erred in finding that Hr. Jacobs attempted to limit his liability in the confession of judgment executed by his client on August 28, 1987, as charged in Charge Three. (Aff. para. 7);

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1 It. is noted that Mr. Jacobs deemed it appropriate to invoke the Court's jurisdiction under 42 U.S.C. Section 1983 in his cross motion. We deem this feature to be irrelevant to our consideration of this matter.

6. That the Appellate Division erred in not complying with CPLR 4213(b)'s requirement that it state the facts essential to its determination. (Note that the same deficiency is claimed by Mr. Jacobs with respect to the Referee's findings). (Aff. para. 5);

7. Mr. Jacobs' constitutional rights "as guaranteed by 42 U.S.C. 1983" were abridged by the Referee who heard the charges, as follows: (Aff. para 10);

a. Refusal to enforce a subpoena for the presence and time records of Pelle & Pelle (these were Mr. Jacobs' adversary counsel) and thus Mr. Jacobs was deprived of evidence establishing how many hours he had spent in serving his client;

b. Limiting Mr. Jacobs' cross examination of his client, the complainant, to test her credibility" with regard to the circumstances and information contained on the tape recording in which, it is claimed, his client, the complainant, admitted knowledge of the fees and their amounts;

c. By including evidence of collateral acts between the complainant and . . . Mr. Jacobs, involving the criminal representation of the complainant" by Mr. Jacobs;

d. Carrying on ex parte communications with the prosecutor for the Grievance Committee";

e. Using as a basis for the penalty imposed Mr. Jacobs' prior involvement with the Grievance Committee (see Opinion of the Appellate Division, 188 AD 2d at 232);

f. Refusing Mr. Jacobs the rights of discovery prior to the hearing "while permitting the Grievance Committee the right to use previously taken testimony of the respondent Mr. Jacobs] before the Grievance Committee in this tatter, taken under compulsion and duress."

Mr. Jacobs' Affidavit then set forth the hours he contends he spent in his representation of the complainant (Aff. para. 12), citing to the transcript of the hearing before the Referee, where his pertinent testimony on the subject appears. He then states that the hours as determined by the Appellate Division "bear no relation to

the evidence presented." He concludes that, had his evidence been accepted, his fees could not have been determined to be excessive.

Finally, Mr. Jacobs contends that his eighth Amendment rights were violated because the Appellate Division's punishment was "disproportionate" to his alleged misconduct.

PROCEEDINGS 0F THE COMMITTEE

This Committee first met with Mr. Jacobs on August 17, 1993. The meeting was a short one and informal. He advised us that he intended to file a lawsuit against the judges of the Appellate Division and others, and we asked him why he believed it was necessary for us to hear testimony on the matter before us, as we sought to understand precisely what Mr. Jacobs was claiming in this proceeding. Essentially, his response was that Chief Judge Platt had ordered us to conduct a hearing and this required that evidence be heard. We advised him that it was our tentative view that you had left it to us to determine. We concluded this meeting by asking Mr. Jacobs to set forth in writing why he felt it was necessary he be given an evidentiary hearing, and the witnesses he would call if permitted to do so. He did so by letter of August 24, 1993. (App. Ex. 3). Our review of this letter did not persuade us to Mr. Jacobs' view of the matter; and so we met with him again on October 25, 1993.

On October 25, once again, our objective was to determine whether the record before us, considered in light of Mr. Jacobs' contentions, required an evidentiary hearing. This meeting was also conducted in an informal manner. Mr. Jacobs again explained, although in greater detail, why he believed he was entitled to an evidentiary hearing and why certain witnesses had to be called.

While we were given more enlightenment by his letter of August 24, and his explanation at the October 25 meeting, Mr. Jacobs was advised that we wished to give him a further opportunity to present to us why, given the extensive record, with which we were familiar, it was necessary for us to take testimony, and we set the matter down for formal hearing, on the record, on November 11,

1993. We advised him that we would want him to come before us on that date to state formally the names of the witnesses he wanted to present to us and to state in summary fashion the evidence he intended to offer through each witness. We told him further that after hearing him on November 11, we would advise him of our views.

Following the October 25 meeting, and prior to our meeting with Mr. Jacobs on November 11, Mr. Jacobs wrote to you on November 3, 1993 (App. Ex. 4).

Turning to our meeting with Mr. Jacobs on November 11, a transcript of that proceeding is filed herewith as App. Ex. 5.

The hearing opened with Mr. Jacobs advising us that he had been before Chief Judge Platt or November 3, 1993, and he presented us with a transcript of that proceeding. Tr. 5.[2] See App. Ex. 6. As there made clear, contrary to Mr. Jacobs' position, Chief Judge Platt had not ordered us to hold an evidentiary hearing, that is, a hearing where witnesses were to be heard. Instead, plainly Chief Judge Platt had left it to this Committee to decide whether such was necessary. Tr. 9-11.

Mr. Jacobs then responded to our request that be state formally the witnesses be wished to call and, in brief, what they would say.

We first addressed the matter of the transcript of a tape recorded conversation between Mr. Jacobs and his client, the complainant. Tr. 19-21. It is filed herewith as App. Ex. 7.

The transcript of this conversation was admitted by the Referee (Tr. Ref. 498) and it was before the Appellate Division, where Mr. Jacobs had the opportunity to make the argument he made before us, that its belated admission by the Referee at the end of the hearing deprived Mr. Jacobs of the opportunity to use the transcript earlier when he had cross examined the complainant.[3] We are unimpressed by this argument as apparently was true of the Appellate Division. Mr. Jacobs knew what the transcript said and he thus was in a position to put questions to the complainant based on

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[2] Unless otherwise noted, this and subsequent transcript references are to the transcript of the proceedings before this Committee on November 11, 1993.

that knowledge, even before it was admitted in evidence. Indeed, the Referee at one point asked Mr. Jacobs why he had not inquired of the complainant about the taped conversation during his cross examination of her. See Transcript of proceedings before the Referee ("Tr. Ref.") 416. If the complainant had given responses that were contradicted by the transcript, Mr. Jacobs had only to show this to the Referee -- and later the Appellate Division. Finally, on this issue, Mr. Jacobs did not complain to the Referee that he had been impaired in his presentation of his case by the late admission of the transcript, or ask that the complainant be recalled. Tr. Ref. 499-500.

Mr. Jacobs also stated he wanted to call the complainant as a witness to cross examine her on the time he spent representing her. Tr. 24. However, he examined her on the same subject before the Referee, and we have reviewed this examination. We perceive no reason why a repetition of this examination need now be heard by us. Tr. Ref. 132-264.

Next, Mr. Jacobs stated he wanted to call David and Dominick Pelle, Esq. Tr. 25-2E. They had represented the complainant's husband in the matrimonial and family proceedings in which Mr. Jacobs had represented the wife, the complainant herein. Mr. Jacobs stated that they, with their time records, would support his claim as to the time he stated he spent.

It appeared that Dominick Pelle, Esq., had submitted an affidavit to the Referee and, according to Mr. Jacobs, it was received in evidence by the Referee and made a part of the record. Tr. 25-28. Egg Dominick Pelle Affidavit, App. Ex. 9. He added that he had objected to the affidavit being admitted in evidence, but did not

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3 Mr. Jacobs' submission to the Appellate Division, "Affidavit in Support of Cross-Motion and Opposition to the Motion, is filed herewith (without exhibits) as App. Ex. 8. It reflects that as to every claim before us, Mr. Jacobs had the opportunity to make, and in most cases did make, the same claim before the Appellate Division.

remember whether he had raised the issue before the Appellate Division. Tr. 47-48. The Referee had addressed the issue of whether he should require the Pelles to appear before him. Be declined to do so, telling Mr. Jacobs to go to the Appellate Division for such an order if he was dissatisfied. Tr. Ref. 446. Subsequently, Mr. Jacobs said he did not wish to close the hearing until he had an opportunity to make an application to the Appellate Division "and having a ruling." Tr. Ref. 497. However, he then rested his case without making that application. Tr. Ref. 498.

In any event, we have reviewed the affidavit. It does not help Mr. Jacobs' cause, as is reflected in the following excerpt from it (Dominick A. Pelle Aff., para. 7):

My records would not be of much help [to Mr. Jacobs] as a substantial part of the time expended by our office on behalf of our client did not involve Mr. Jacobs. He was out of the case most of the time or did not appear on some occasions.

The Pelle affidavit also states that Mr. Pelle told Mr. Jacobs (Dominic A. Pelle Aff., para. 5):

[M]y testimony would not be helpful to him....
In any event, I agreed to appear upon a telephone call when my testimony required . . .. I never received a telephone call requesting my appearance. If I had received such a call, I would have appeared with my records. I again advised Mr. Jacobs that I did not feel that my records would help him.

We see no reason for taking testimony from either of the Pelles.

Next, Mr. Jacobs stated he wanted to call before us the Referee, Moses Weinstein, as a witness, Tr. 48. The area of questioning he proposed was that related to the number of hours of legal services performed by Mr. Jacobs as determined by the Referee,

as contrasted with those testified to and claimed by Mr. Jacobs. Put squarely, Mr. Jacobs wanted "to examine . . . [the Referee] on how he arrived at his result." Tr. 49. Of course, the answer here is that the Referee, charged with resolving credibility issues, must have disbelieved Mr. Jacobs' claim of hours spent. We have reviewed the transcript of that proceeding and find that the Referee's findings were supported by the record. Moreover, we note that here, too, Mr. Jacobs had the opportunity to argue this issue on the record before the Appellate Division and was unsuccessful. More specifically, Mr. Jacobs testified at length before the Referee on the time he spent providing legal services to his client. Tr. Ref. Direct Exam. 369-430; Cross Exam. 452-491; Redirect exam. 492-497. On cross examination, there was much developed to contradict Mr. Jacobs' direct examination on the time he claimed to have spent. It thus appears that the Referee made a credibility judgment and disbelieved much of what Mr. Jacobs vas asserting. We cannot say that the Referee was wrong in so doing. We perceive no basis for having the Referee testify before us to explain his reasoning.

Mr. Jacobs stated he also wished to examine the Referee on certain suspected ex parte discussions that allegedly took place between the Referee and Mr. Guido, counsel for the State Grievance Committee. Tr. 49-52. We find no basis here for calling the questioning he proposed was that related to the number of hours of legal services performed by Mr. Jacobs as determined by the Referee, as contrasted with those testified to and claimed by Mr. Jacobs. Put squarely, Mr. Jacobs wanted "to examine . . . [the Referee] on how he arrived at his result." Tr. 49. Of course, the answer here is that the Referee, charged with resolving credibility issues, must have disbelieved Mr. Jacobs' claim of hours spent. We have reviewed the transcript of that proceeding and find that the Referee findings were supported by the record. Moreover, we note that here, too, Mr. Jacobs had the opportunity to argue this issue on the record before the Appellate Division and was unsuccessful. More specifically, Mr. Jacobs testified at length before the referee on the time he spent providing legal services to his client. Tr. Ref. Direct Exam. 369-430;

Cross Exam. 452-491; Redirect Tr. Ref. 492-497. On cross examination, there was much developed to contradict Mr. Jacobs' direct examination on the time he claimed to have spent. It thus appears that the Referee made credibility judgment and disbelieved much of what Mr. Jacobs was asserting. We cannot say that the Referee was wrong in so doing. We perceive no basis for having the Referee testify before us to explain his reasoning.

Mr. Jacobs stated he also wished to examine the Referee on certain suspected ex parte discussions that allegedly took place between the Referee and Mr. Guido, counsel for the State Grievance Committee. Tr. 49-52. We find no basis here for calling the Referee as a witness. Certainly, there is nothing in the record to support the allegation. Again, if it did occur, Mr. Jacobs had the opportunity to argue the issue before the Appellate Division.

Finally, Mr. Jacobs desired that he be permitted a judge from the Appellate Division. Here he stated that he was prepared to subpoena all the judges who had rendered that Court's decision against him. Tr. 58. If permitted to call them as witnesses, he said, he would ask them how they arrived at the hours they found he had spent in providing legal services to the complainant. Tr. 59-60. We find no basis for this extraordinary step. As we have stated, there was ample support in the record not only for the Referee's determination, but for that of the Appellate Division.

The last witness Mr. Jacobs would have called, if permitted to do so, was Mr. Jacobs himself. Tr. 60-64. We find no basis for an evidentiary hearing in this respect either. We have the benefit of the record, which includes Mr. Jacobs' extensive testimony, as heretofore noted.

CONCLUSION

In short, we find that Mr. Jacobs was afforded a fair hearing before the Referee, and that there are no constitutional

infirmities there or in the proceedings before the Appellate Division.[4]

On the basis of the foregoing, we see no basis for any further proceeding, and, responding to the questions raised by the Court, we recommend that Mr. Jacobs be suspended from practicing law in this Court as he has been by the Appellate Division for the Second Department.

The Honorable Frederick B. Lacey

The Honorable Owen McGivern

The Honorable Milton Mollen

[4] We do note that se are of a view as to the confessions of judgment that if slightly different from that taken by the Appellate Division. The Appellate Division stated (166 AD at 230, 231):
The respondent wrongfully filed the confession of judgment to effect payment rather than holding it as security for payment of his outstanding legal fees.

To our knowledge, Mr. Jacobs did not attempt to execute on the judgments. On the other hand, the intention to execute in order to effect payment, if it became necessary, can reasonably be inferred from the very act of filing.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
SONDRA MILLER, JJ.

90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER ON MOTION

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

Motion by the respondent for reargument of this court's opinion and order, dated March 8, 1993, suspending him from the practice of law for a period of three years and directing him to vacate the judgments entered against his client, or, in the alternative, for leave to appeal to the Court of Appeals. The respondent was admitted to the practice of law by this court on June 20, 1979.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and MILLER, JJ., concur.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at the Court of Appeals Hall in the City of Albany on the ninth day of July 1993

Present, HON. JUDITH S. KAYE Chief Judge, presiding.

Mo. No. 394

In the Matter of David Barnett Jacobs,
an attorney and counselor-at-law.
Grievance Committee for the Tenth Judicial District,
Respondent,

David Barnett Jacobs,
Appellant.

A motion for leave to appeal to the Court of Appeals &c. In the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, It. is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and It. is

ORDERED, that the said motion for leave to appeal &c. be and the same hereby is denied.

Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
SONDRA MILLER, JJ.

90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

Proceeding pursuant to statute (Judiciary Law § 90) to discipline the respondent, David Barnett Jacobs, an attorney and counselor-at-law, who was admitted to practice by to practice by the Appellate Division of the Supreme Court, Second Judicial Department, on June 20, 1979.

The respondent filed a cross-petition and verified answer to petition" requesting an order (a) vacating the authorization for the disciplinary proceeding set forth in this Court 's order of July 17, 1990, (b) referring this matter to the arbitration panel of the Nassau County Bar Association to arbitrate the fee dispute in question; or in the alternative, (c) directing that the Justice assigned to the matrimonial case in question conduct a hearing to confirm the attorney's fees, and

(d) staying the disciplinary proceeding pending the proposed hearing in the Supreme Court, Nassau County.

Upon the papers filed in support of the application to discipline, the answer thereto, and upon the cross petition and the papers filed in opposition thereto, it is

May 10, 1991 Page 1.

MATTER OF JACOBS, DAVID BARNETT

ORDERED that the issues raised by this petition and the respondent's answer are referred to Hon. Max H. Galfunt. a former Criminal Court Judge, 216 Beach 143rd Street, Neponsit, New York 11694, as Special Referee to hear and to report, together with his findings on the issues; and it is further

ORDERED that the respondent's cross petition is denied.

MANGANO, PJ., THOMPSON, BRACKEN, BROWN and MILLER, JJ., concur

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPT.
I, MARTIN H. BROWNSTEIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared the copy with the original filed in my office on MAY 10 1991 and that the same is a correct transcription of said original.
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Court on MAY 10 1991

ENTER: MARTIN H. BROWNSTEIN

Martin H. Brownstein
Clerk

May 10, 1991 Page 2.

MATTER OF JACOBS, DAVID BARNETT

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
JOSEPH J. KUNZEMAN
THOMAS R, SULLIVAN, JJ.

90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER ON MOTION

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

Petitioner Grievance Committee for the Tenth Judicial District moved for a proceeding pursuant to statute (Judiciary §90) to discipline the respondent, David Barnett Jacobs, an attorney. who was admitted to practice by the Appellate Division of the Supreme Court, Second Judicial Department on June 20, 1979. By decision and order of this court dated May 10, 1991, this matter was referred to Hon. Max H. Galfunt, as Special Referee to hear and report, together with his findings on the issues. By decision and order dated May 21, 1991, Hon. Max H. Galfunt was relieved as Special Referee and the matter was referred to Hon. Moses M. Weinstein, a retired Associate Justice of the Appellate Division, Second Judicial Department, c/o Weinstein & Weinstein, 123-35A 82nd Road, Kew Gardens, NY 11415, as Special Referee.

Respondent now moves for an order permitting him to (1) conduct an examination before trial of the complainant, Patricia Warmhold; (2) to obtain a bill of particulars from the complainant, Patricia Warmhold; (3) to obtain complete disclosure of all relevant and material information in the possession of the complainant and/or Grievance Committee for the Tenth Judicial District; and (4) for an order directing that all further proceedings be stayed pending a the determination of the instant motion, and if granted, for a stay pending completion of discovery.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied in its entirety.

MANGANO, PJ., THOMPSON, KUNZMEN and SULLIVAN, JJ., concur.

Enter
Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIV1SION SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R, SULLIVAN.
SONDRA MILLER, JJ.
90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER ON MOTION

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

By decision and order of this court dated July 17, 1990, the petitioner was authorized to institute an(l prosecute a disciplinary proceeding against the respondent. By further order dated May 10, 1991, the respondent's cross-motion to vacate the authorization was denied and the issues were referred to the Hon. Max Galfunt, as Special Referee to hear and report. By order of May 21, 1991, the Hon. Moses M. Weinstein was appointed as Special Referee (relieving the Hon. Max Galfunt). the hearing was closed on November 14, 1991. The respondent now moves for an order: (I) holding in contempt Dominick Pelle, Esq., the attorney who represented the husband in the matrimonial action from which the charges of misconduct against the respondent emanated; (2) reopening the disciplinary proceeding against the respondent to receive evidence related to the subpoenaed information; (3) directing Dominick Pelle, Esq. to appear with the relevant records at the office

of the Grievance Committee pursuant to the subpoenas duly served upon him for the purpose of giving evidence in the disciplinary proceeding against the respondent; and (4) staying all proceedings pending receipt of the proposed information. The respondent was admitted to the practice of law by the Appellate Division of the Supreme Court, Second Judicial Department on June 20, 1979.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

MANGANO, PJ., THOMPSON, BRACKEN, SULLIVAN and MILLER, JJ., concur.

Enter
Martin H. Brownstein
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND JUDICIAL DEPARTMENT

(NOT TO BE PUBLISHED)

GUY JAMES MANGANO, P.J.
William C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
SONDRA MILLER, JJ.
90-06574

In the Matter of David Barnett Jacobs, an attorney and counselor at law.

DECISION & ORDER ON APPLICATION

Grievance Committee for the Tenth Judicial District, petitioner;

David Barnett Jacobs, respondent.

Application by the Grievance Committee for the Tenth Judicial District pursuant to statute Judiciary Law, § 90[7]) for leave to institute and prosecute a disciplinary proceeding in this Court as petitioner against David Barnett Jacobs, an attorney, who was admitted to practice by the Appellate Division, Second Judicial Department on June 20, 1979, for acts of professional misconduct alleged in the committee's report, dated February 16,1990.

ORDERED that the application is granted; and it is further,

ORDERED that the Grievance Committee for the Tenth Judicial District is hereby authorized to institute and prosecute a disciplinary proceeding h this court, as petitioner, against the said David Barnett Jacobs based on the acts of professional misconduct set forth in the said committee's report; and it is further,

ORDERED that Frank A. Finnerty, Jr., Chief Counsel to the Grievance Committee for the Tenth Judicial District, 900 Ellison Avenue, Suite 304, Westbury, New York 11590, is hereby appointed as attorney for the petitioner in such proceeding.

MANGANO. PJ.. THOMPSON, BRACKEN, BROWN and MILLER, JJ., concur.

Enter
Martin H. Brownstein
Clerk

July 17, 1990

MATTER OF JACOBS, DAVID BARNETT

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

FIFTH AMENDMENT TO THE U.S. CONSTITUTION:

...nor shall any person...be deprived of life, liberty, or property, without due process of law...

SIXTH AMENDMENT TO THE U.S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

EIGHTH AMENDMENT TO THE U.S. CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION:

Section 1....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

THE CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE 1, 1:

No member of this state shall be...deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers...

ARTICLE 1, 6:

...No person shall be deprived of life, liberty or property without due process of law.

ARTICLE 1, 11

No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

ARTICLE VI, 3(7):

No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding or order entered in an appeal from another court including an appellate or special term of the supreme court unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

TITLE 28, U.S.C. § 2283:

A Court of the United States may not grant an injunction to stay a proceeding in a State Court, except as expressly authorized by

Congress, or where necessary to aid in its jurisdiction or to protect or effectuate its judgments.

NEW YORK STATUTES

Judiciary Law § 90

2. The supreme court shall have power and control over attorneys and counselors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counselor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counselor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another...
...In the case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

6. Before an attorney or counselor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or

otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense....

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counselor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein.

(2)

No. 94-2012

Supreme Court, U.S.
FILED
AUG 9 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

DAVID B. JACOBS, PETITIONER

v.

GRIEVANCE COMMITTEE
FOR THE EASTERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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28 pp

QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's suspension of petitioner from practice before the district court.

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In the Supreme Court of the United States

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No. 94-2012

DAVID B. JACOBS, PETITIONER

v.

GRIEVANCE COMMITTEE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 44 F.3d 84. The decision of the Grievance Committee of the district court (Pet. App. A19), and the opinion of the committee of attorneys appointed to advise the Grievance Committee (Pet. App. A20-A36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1994. A petition for rehearing was denied on March 10, 1995. Pet. App. A18. The petition

for a writ of certiorari was filed on June 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

STATEMENT

1. a. Petitioner is an attorney currently suspended from practice before the courts of the State of New York. Based upon a complaint from a former client, Patricia Warmhold, in 1990, the Grievance Committee for the Tenth Judicial District of the Appellate Division of the New York State Supreme Court, Second Department, charged petitioner with five counts of professional misconduct. Two counts

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[1] Petitioner also invokes 28 U.S.C. 1257(a) and 2403(b). Pet. 3. Section 1257(a) authorizes review by writ of certiorari of "[f]inal judgments or decrees rendered by the highest court of a State * * * where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution * * * of the United States." Petitioner contends that Section 1257(a) provides a basis for jurisdiction here because his petition draws into question the validity of Rule 4 of the General Rules of the United States District Court for the Eastern District of New York, and Section 90 of the Judiciary Law of the State of New York (McKinney 1983 & Supp. 1995). Pet. 3. Rule 4 of the district court's local rules, however, is not a "statute of any State" within this provision. While Section 90 of the New York Judiciary Law is such a statute, the final judgment of the New York courts upholding petitioner's suspension from the practice of law was entered on July 6, 1993. *In re Jacobs*, 619 N.E.2d 647 (N.Y. 1993). The 90 days within which a petition for review of that decision might have been filed has expired. See Sup. Ct. R. 13.1.

Section 2403(b) does not contain an affirmative grant of jurisdiction, but provides for notification of the appropriate state Attorney General in cases where "the constitutionality of any statute of that State affecting the public interest is drawn in question." 28 U.S.C. 2403(b).

alleged that petitioner charged Warmhold excessive fees, in violation of disciplinary rule (DR) 2-106 of the New York Code of Professional Responsibility.[2] Two counts alleged that petitioner improperly secured from Warmhold, and filed with the Clerk of Nassau County, two confessions of judgment for legal fees. In each instance, petitioner "failed to first provide [Warmhold] with a complete and full explanation of the character, effect, and purpose of the confession of judgment." Pet. App. A23-A24. A fifth count charged that petitioner improperly attempted to limit his malpractice liability to Warmhold. See *id.* at A3, A24.

b. In July, 1990, the Appellate Division authorized the Grievance Committee to begin disciplinary proceedings against petitioner and, in May, 1991, it appointed a special referee to hear evidence and to make a report. Pet. App. A3, A43, A45-A46. The referee held five hearings between June and November, 1991, at which both Warmhold and petitioner testified. *Id.* at A3. In June, 1992, the referee sustained the charges of misconduct and, on March 8, 1993, the Appellate Division, on application of the Grievance Committee, upheld that report. *Id.* at A3, A21-A27; *In re Jacobs*, 594 N.Y.S.2d 794 (1993). The Appellate Division suspended petitioner from the practice of law for a period of three years beginning on April 12, 1993, and directed him to vacate the

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[2] DR 2-106 of the New York Code of Professional Responsibility (subsequently codified as Title 22 of the New York Code, Rules & Regulations) prohibits a lawyer from "enter[ing] into an agreement for, charg[ing,] or collect[ing] an illegal or excessive fee" and sets forth various factors used to determine whether the fee is "excessive." DR 2-106(A) and (B)(1)-(8), 22 N.Y.C.R.R. § 1200.11.

confessions of judgment against Warmhold. Pet. App. A3, A27. In imposing the sanction, the Appellate Division considered three prior disciplinary actions it had taken against petitioner—two in 1986 and one in 1990. *Id.* at A26. The New York Court of Appeals denied petitioner's application for review. *In re Jacobs*, 619 N.E.2d 647 (1993); Pet. App. A38.

2. a. In April, 1993, Chief Judge Thomas Platt of the United States District Court for the Eastern District of New York, as chairman of the Grievance Committee for that court, issued an order to petitioner to show cause why he should not be suspended from practice before that court based on his New York suspension. Pet. App. A3-A4.[3] Judge Platt appointed a committee of three retired judges to act as an advisory panel to assist the Grievance Committee in evaluating discipline against petitioner.[4] Rule 4(g) of the district court's rules authorizes the federal court to impose reciprocal discipline on an

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[3] Rule 4(a) of the Local Rules of the Eastern District of New York authorizes the Chief Judge of the district to "appoint a committee of * * * judges known as the committee on grievances, which under the direction of the chief judge shall have charge of all matters relating to discipline of attorneys." See Pet. App. A14. The district court's Grievance Committee in this case consists of Chief Judge Thomas C. Platt as Chairman, and United States District Judges Leonard D. Wexler, Reena Raggi and Arthur D. Spatt. *Id.* at A9. Rule 4(d) provides for discipline of members of the bar by the court if "any member of the bar * * * has been disciplined by any federal court or by the court of any state, territory, district, commonwealth or possession." Pet. App. A14.

[4] The panel was comprised of former United States District Judge Frederick B. Lacey and former Justices Owen McGivern and Milton Mollen of the Appellate Division of the New York State Supreme Court. See Pet. App. A4, A36.

attorney based upon state discipline "unless the member of the bar concerned establishes by clear and convincing evidence" that the state disciplinary proceeding suffers from an "infirmity of proof of misconduct" or "was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process," or that imposition of discipline would result in "grave injustice." Pet. App. A15. See *Selling* v. *Radford*, 243 U.S. 46 (1917).

b. The advisory panel met with petitioner on several occasions to determine whether an evidentiary hearing would be necessary to permit petitioner to demonstrate either a constitutional infirmity in the state proceedings or a grave injustice from federal discipline. Pet. App. A30-A35. The panel concluded that an evidentiary hearing was not necessary, that petitioner "was afforded a fair hearing before the [New York] [r]eferee, and that there [were] no constitutional infirmities" in the state proceedings. *Id.* at A35-A36. Petitioner sought orders from Chief Judge Platt to enjoin enforcement of the state suspension order and to require the advisory panel to hold an evidentiary hearing. Both requests were denied. *Id.* at A4, A31. On January 31, 1994, the district court's Grievance Committee unanimously adopted the opinion of the advisory panel and suspended petitioner from practice before the district court "during the period of his suspension" by the New York courts. *Id.* at A5, A19.

c. The court of appeals affirmed. Pet. App. A1-A17. Concluding that it had jurisdiction over the appeal (*id.* at A5-A7), the court agreed with the Grievance Committee that "the state proceeding was fair and free of federal constitutional infirmity" (*id.* at A8). It rejected petitioner's claims of Fifth, Sixth, Seventh

and Eighth Amendment violations as based either on the "groundless assertion that an attorney subject to a state disciplinary proceeding enjoys the full panoply of federal constitutional protections that apply to a criminal prosecution" or on the "equally flawed assertion[s]" that the Seventh Amendment applies to state as well as federal actions and that petitioner was entitled to a jury trial with respect to the reasonableness of his fee. *Id.* at A8-A9.

The court also rejected petitioner's procedural challenges to the federal court suspension. The court concluded that petitioner was not entitled to be served with the complaint triggering the federal disciplinary proceedings; that he had received adequate notice of the charges against him; and that the advisory panel's decision not to conduct an evidentiary hearing violated neither due process nor district court Rule 4. Pet. App. A10-A13 (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)).

On March 10, 1995, the court denied a petition for rehearing with suggestion of rehearing in banc. Pet. App. A18.

ARGUMENT

Petitioner argues that the state disciplinary proceeding is void for lack of subject-matter jurisdiction and that it violated a number of his constitutional rights. Petitioner also asserts procedural and substantive challenges to the Rule 4 procedure under which the federal Grievance Committee suspended him on the basis of the state court's order.

1. Petitioner contends that the "[f]ederal [c]ourts have the power to review State Court disciplinary proceeding[s] and decisions" (Pet. 29). Throughout his petition, petitioner makes various constitutional

and procedural challenges to his suspension by the New York authorities. The issue before the court of appeals, however, was the validity of the federal district court's decision to suspend petitioner. The constitutionality and procedural integrity of the state proceedings are relevant only insofar as they may affect the federal district court's decision to rely on the state court's disciplinary proceedings.[5]

Suspension by a federal court does not automatically flow from suspension by a state court. See *Theard* v. *United States*, 354 U.S. 278, 281 (1957). Nevertheless, in *Selling* v. *Radford*, 243 U.S. 46, 50 (1917), this Court, noting that its "duty [was] not to review the action of the state court of last resort," held that "wrongful personal and professional conduct, wherever committed, operates everywhere and must in the nature of things furnish adequate reason in every jurisdiction for taking away the right to continue to be a member of the Bar in good standing." *Id.* at 49. Based upon such considerations, the Court held that a federal court is entitled to rely upon a

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[5] The decision of the New York authorities suspending petitioner became final on July 6, 1993, when the New York Court of Appeals denied petitioner's application for permission to appeal. *In re Jacobs*, 619 N.E.2d 647. Petitioner did not seek review of that decision by this Court. See note 1, *supra*. The federal district court issued an order to show cause why petitioner should not be suspended from practicing before that court in light of the state court suspension, initiated disciplinary proceedings of its own, and suspended petitioner for a period of three years. "[L]ower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 296 (1970). See also *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 476 (1983); *In re Rosenthal*, 854 F.2d 1187, 1188 (9th Cir. 1988).

State's determination of an attorney's fitness to practice

> unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard, was wanting in due process; 2. that there was such an infirmity of proof as to facts found * * * as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3. that some other grave reason exist[s] * * * not to disbar * * * under principles of right and justice.

Id. at 51.

Under *Selling*, federal courts "will, in the absence of some grave reason to the contrary, follow the finding of the state" disciplinary authorities. *In re Isserman*, 345 U.S. 286, 288 (1953); *Theard* v. *United States*, 354 U.S. at 282 (state determination "brings title deeds of high respect"); *In re Reinstatement of Leaf*, 41 F.3d 281, 284 (7th Cir. 1994); *In re Rosenthal*, 854 F.2d 1187, 1188 (9th Cir. 1988).[6] The provisions of Rule 4(g) applied by the district court in this case track the considerations set forth in *Selling*. See Pet. App. A15. Thus, the burden was on petitioner to

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[6] The two cases relied upon by petitioner as establishing the authority of federal courts to "review State Court disciplinary proceeding[s]" acknowledge the controlling standard established by *Selling*. See Pet. 29 (citing *In re Gordon*, 640 F.2d 1143, 1146-1150 (10th Cir. 1981)); *Getty* v. *Reed*, 547 F.2d 971, 977 (6th Cir. 1977) ("relief from state disbarment proceedings can only be had in unusual and limited circumstances—and then only upon proof of federal constitutional violation"; citing *Theard*).

demonstrate "good cause" why the district court erred in relying on the New York court's decision to suspend him. *In re Isserman*, 345 U.S. at 289. Because petitioner failed to make such a showing, the federal district court was entitled to rely on the State's disciplinary decision. Local Rule 4(d).

2. a. Petitioner claims that the federal court may not suspend him from practice because the state disciplinary proceedings were "void for want of subject matter jurisdiction." Petitioner argues that any action in which an attorney's fee is at issue is a suit at common law and, consequently, petitioner is entitled to a trial by jury. He contends that the reasonableness of his fee therefore cannot be the subject of a state disciplinary proceeding. Pet. 9-15.

"Courts have long recognized an inherent authority" over the conduct of attorneys who practice before them, which authority "derives from the lawyer's role as an officer of the court which granted admission." *In re Snyder*, 472 U.S. 634, 643 (1985). See also *Florida Bar* v. *Went For It, Inc.*, No. 94-226 (June 21, 1995), slip op. 7, 17 (substantial state interest in regulating the conduct of state-licensed lawyers). Based upon that inherent authority, courts have also held that they have authority to protect a client from excessive legal fees. See, *e.g.*, *Curry* v. *Del Priore*, 941 F.2d 730, 731-732 (9th Cir. 1991) (citing *Coffelt* v. *Shell*, 577 F.2d 30, 32 (8th Cir. 1978)); *Pfeifer* v. *Sentry Insurance*, 745 F. Supp. 1434, 1443 (E.D. Wis. 1990); *Wunschel Law Firm, P.C.* v. *Clabaugh*, 291 N.W.2d 331, 334 (Iowa 1980).

New York, by statute, has vested the authority over attorney discipline in the Appellate Division of the State Supreme Court. N.Y. Jud. Law § 90(2) (McKinney 1983); Pet. App. A49. The New York Court of

Appeals has recognized that the Appellate Division has exclusive jurisdiction over matters of professional misconduct, *Erie County Water Authority* v. *Western N.Y. Water Co.*, 107 N.E.2d 479, 480-481, cert. denied, 344 U.S. 892 (1952), and has held that the Appellate Division's authority extends to legal fees charged by members of the New York Bar, *Gair* v. *Peck*, 160 N.E.2d 43, 51, 53 (1959) ("The idea is frivolous that disciplinary power over attorneys is unrelated to the exaction of excessive fees."), cert. denied, 361 U.S. 374 (1960). Petitioner's contention that the Appellate Division lacked jurisdiction to determine whether he charged an excessive fee in violation of the New York Code of Professional Responsibility is consequently without merit.[7]

b. Petitioner also claims that Section 90(2) of the New York State Judiciary Law and Section 691.10 of the Rules of the Appellate Division are unconstitutional as applied to petitioner because they violate his "right to contract" with clients. Pet. 12-15. Under those provisions, petitioner is permitted only *quantum meruit* for his past services.

This Court has long recognized that "freedom of contract is a qualified and not an absolute right," and does not provide "immunity from reasonable regulations and prohibitions imposed in the interests of the community." *West Coast Hotel Co.* v. *Parrish*, 300

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[7] Petitioner also errs in claiming that Section 474 of the New York Judiciary Law insulates his fee contract from disciplinary examination. Pet. 15. Section 474 provides that the right of an attorney and client to enter into a fee agreement "is not restrained by law," N.Y. Jud. Law § 474 (McKinney 1983). The New York Court of Appeals rejected a similar contention in *Gair* v. *Peck*, 160 N.E.2d at 53.

U.S. 379, 392 (1937) (quoting *Chicago, B. & Q. R.R.* v. *McGuire*, 219 U.S. 549, 567 (1911)). That is particularly true of attorneys, who are subject to a "complex code of behavior" arising from their obligations, not only to their clients, but also to the system of justice. *In re Snyder*, 472 U.S. at 644 (quoting *In re Bithoney*, 486 F.2d 319, 324 (1st Cir. 1973)). As this Court has recognized:

> "Membership in the bar is a privilege burdened with conditions." [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.

In re Snyder, 472 U.S. at 644 (quoting *People ex rel. Karlin* v. *Culkin*, 162 N.E. 487, 489 (N.Y. 1928)). "Freedom of contract" therefore does not insulate petitioner's conduct from disciplinary examination by the New York authorities.

c. Petitioner claims that he has been suspended without a showing that he violated any statute, law, rule, regulation or "recognized or codified standard," in violation of due process. Pet. 27-29. The Appellate Division concluded that petitioner violated the prohibition against an "excessive fee" under the specific standards set forth in DR 2-106 of the New York Code of Professional Responsibility and that he obtained confessions of judgment and a release of liability from his client without properly informing her of the consequences of executing those documents. See, *e.g.*, *Greene* v. *Greene*, 436 N.E.2d 496, 500 (N.Y. 1982) (client must be "fully and fairly informed of the consequences"). In accord with *Selling*, the federal district court properly followed that determination in

the absence of any showing by petitioner of any infirmity of proof, want of due process or other "grave reason" why he should not be suspended from practice.

d. Petitioner argues that the state proceedings violated his rights under the Sixth (Pet. 22-25), Seventh (Pet. 19) and Eighth Amendments (Pet. 25-26), as well as his right to due process (Pet. 24-25).[8] The Sixth Amendment, by its terms, applies only "in * * * criminal prosecution[s]." *United States* v. *Zucker*, 161 U.S. 475, 481 (1896); *United States* v. *Certain Real Property & Premises*, 954 F.2d 29, 35 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992). An attorney disciplinary proceeding is not a criminal prosecution to which the Sixth Amendment applies. *Rosenthal* v. *Justices of the Supreme Court of California*, 910 F.2d 561, 564-565 (9th Cir. 1990), cert. denied, 498 U.S. 1087 (1991); *In re Daley*, 549 F.2d 469, 474-477 & n.6 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *In re Anonymous Attorneys* v. *Bar Ass'n of*

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[8] Petitioner's claims (Pet. 22-25) pertaining to alleged errors committed during the state disciplinary proceedings do not constitute violations of due process. See *Selling* v. *Radford*, 243 U.S. at 51. With respect to the testimony of Dominick Pelle, counsel for complainant's husband, petitioner failed to pursue with the Appellate Division the referee's denial of his request that Pelle be subpoenaed for the state court proceedings. See Pet. 21-22; Pet. App. A32-A33. Petitioner also failed to question the complainant regarding a tape-recorded conversation between them about legal fees, despite the fact that the transcript of the tape was available to petitioner during the hearing before the referee. Pet. 22-23; Pet. App. A31-A32. Finally, petitioner failed to demonstrate how "evidence of collateral acts" involving his representation of complainant in criminal proceedings unfairly led to his suspension. Pet. 23-24.

Erie County, 362 N.E.2d 592, 595 (N.Y. 1977); *Goldman* v. *State Bar*, 570 P.2d 463, 468 (Cal. 1977).

Petitioner claims that he was improperly denied a jury trial in the state proceeding. However, the Seventh Amendment does not apply to state court proceedings. *Minneapolis & St. L. R.R.* v. *Bombolis*, 241 U.S. 211, 217 (1916). See *Ex parte Wall*, 107 U.S. 265, 288 (1882).

Petitioner complains that the Appellate Division improperly considered three prior incidents of discipline in ordering his three-year suspension from practice. Pet. 24-25; Pet. App. A26. Contrary to petitioner's assertion that the consideration of prior disciplinary action constituted "an attempt by the Grievance Committee to further charge the petitioner in this proceeding with prior acts" (Pet. 24), the Appellate Division considered prior disciplinary action only in the context of the appropriate disciplinary sanction. Pet. App. A26. The court did not err in taking petitioner's previous misconduct into account for that purpose. Even in a criminal proceeding, a court's consideration of a defendant's prior convictions in connection with imposition of sentence does not violate due process. See *Williams* v. *New York*, 337 U.S. 241, 245-247, 250-251 (1949); *Nichols* v. *United States*, 114 S. Ct. 1921, 1927-1928 (1994) (courts may consider defendant's past criminal behavior in imposing sentence even if no conviction resulted from that behavior). Indeed, this Court has recently reaffirmed the long-standing rule that "a sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Witte* v. *United States*, 115 S. Ct. 2199, 2205 (1995) (quoting *United*

States v. *Tucker*, 404 U.S. 443, 446 (1972)). Consideration of prior disciplinary sanctions in determining the sanction to be imposed in a civil disciplinary context is clearly constitutionally permissible.

Petitioner also claims that the Appellate Division's consideration of his record of prior discipline violates due process because he did not receive notice that those acts "would be a consideration in determining the sanction or punishment." Pet. 25. In determining the appropriate measure of discipline, the Appellate Division took into consideration a 1986 Letter of Reprimand, a 1986 Letter of Caution, and a 1990 Letter of Admonition. Pet. App. A26. Petitioner has not claimed that he was not the subject of those disciplinary actions, nor has he claimed that those disciplinary letters were not, in fact, issued. Petitioner therefore could not have been prejudiced by the Appellate Division's consideration of those letters.[9]

Petitioner argues that his suspension from practice (and the resulting loss of employment and income) constitutes cruel and unusual punishment in violation of the Eighth Amendment. Pet. 25-26, 28. Suspension from practice, however, is not punishment to which that Amendment would apply. Rather, it is remedial and serves the "purpose of preserving the courts of justice from the official ministration of

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[9] Petitioner has cited *Sexton* v. *Arkansas Supreme Court Comm. on Professional Conduct*, 730 F. Supp. 285 (W.D. Ark. 1990), a case holding that due process required that the "plaintiff be given notice of facts that the prosecutor believes are relevant to fixing punishment, so that he may offer proof that those facts are untrue." *Id.* at 287. The *Sexton* court also held, however, that any error associated with fixing punishment in that case was rendered harmless because the facts considered by the committee on professional conduct were true. *Ibid.*

persons unfit to practice in them." *Ex parte Wall*, 107 U.S. at 288-289; see *In re Isserman*, 345 U.S. at 289.

3. Petitioner's argument that the federal district court committed procedural errors in suspending him from practice is without merit.

a. Petitioner claims that the federal district court did not notify him of the charges against him or provide him an opportunity to be heard in response to those charges. Pet. 16-17, 20-21. As the court of appeals noted, however, the district court's show-cause order to petitioner appended a copy of the March 8, 1993 Opinion and Order of the Appellate Division, which "clearly sets out the charges" against petitioner. Pet. App. A11; see *id.* at A21-A27. Unquestionably, that notice was "of such nature as reasonably to convey the required information." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

b. Petitioner also claims that he was never served with "the Complaint" that would trigger the federal disciplinary proceedings, as required by Rule 4(i) of the district court's rules. Pet. 17, 20. As the court of appeals noted, however, Rule 4 does not require that a copy of the complaint be served on petitioner. Pet. App. A10-A11. In this case, the "complaint" was the certified copy of the Opinion and Order of the Appellate Division suspending petitioner. The federal court forwarded a copy of that Order to petitioner along with the federal court's show-cause order. *Id.* at A11. Neither the Constitution nor the district court's rules require additional notice of the charges to petitioner. *Id.* at A11, A16.

c. Petitioner claims, Pet. 10, 16-17, that he was entitled to a *de novo* evidentiary hearing prior to

the imposition of discipline by the federal court. Following *Selling*, however, courts have generally held that attorneys are not entitled to a *de novo* evidentiary hearing before a federal court following state discipline consistent with due process. *In re Rosenthal*, 854 F.2d at 1188; *In re Jafree*, 759 F.2d 604, 605 n.1, 607 n.4 (7th Cir. 1985). Nor, as the court of appeals correctly noted, does Rule 4(i) require a full evidentiary hearing. See Pet. App. A11, A16. In addition, contrary to his assertion that he has been afforded no "opportunity to be heard," petitioner had several meetings as well as a "formal hearing" before the advisory panel, during which the panel gave petitioner opportunities to demonstrate that an evidentiary hearing would be necessary to reveal an infirmity of proof, a want of due process in the state proceedings, or a risk of grave injustice from suspending petitioner on the basis of his state suspension. *Id.* at A13, A30-A31.

Those federal proceedings also fully comported with any requirement of due process under the Fifth Amendment. See *Ex parte Wall*, 107 U.S. at 288-289. The court of appeals properly analyzed the relevant public and private interests involved under *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and correctly held that the denial of a full federal evidentiary hearing did not violate petitioner's due process rights, given the low risk of an erroneous deprivation of petitioner's interest in practicing law and the important public interest in not expending judicial resources on a federal proceeding that would largely duplicate the prior state proceeding. Pet. App. A12-A13.

d. Finally, petitioner contends that the federal proceedings violated his right to confrontation and

cross-examination under the Sixth Amendment (Pet. 21-22), his right to a jury trial in violation of the Seventh Amendment (Pet. 16, 19), and the Eighth Amendment's prohibition of cruel and unusual punishment (Pet. 28). As noted above, the Sixth Amendment applies only to criminal proceedings. A disciplinary proceeding is not a suit at common law and does not come within the purview of the Seventh Amendment. Nor does suspension from the practice of law constitute punishment within the meaning of the Eighth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995

Supreme Court, U.S.
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(3)

No. 94-2012

In the

SUPREME COURT OF THE UNITED STATES

October Term 1995

DAVID B. JACOBS, Esq., Petitioner

v.

GRIEVANCE COMMITTEE
FOR THE EASTERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE PETITIONER IN REPLY

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1995

In the Matter of DAVID B. JACOBS, an
Attorney and Counselor at Law

GRIEVANCE COMMITTEE
FOR THE EASTERN DISTRICT OF NEW YORK

Respondent,

v.

DAVID B. JACOBS, Esq.,

Petitioner.

BRIEF OF THE PETITIONER IN REPLY

STATEMENT

This reply was necessitated by what, in good faith, the Petitioner thinks are errors, omissions and/or mis-statements of the facts and law as represented by the Respondent's brief..

ARGUMENT

The Respondent's brief at note 5, bottom of page 7 stated that the Petitioner did not seek review in this Court of the Court of Appeals of the State of New York's decision denying the Petitioner's application for permission to appeal. In re Jacobs, 619 N.E.2d 647.

The reason that no direct appeal was taken to this Court within 90 days of the decision referred to above was because it was not a final decision of the highest court of the state within the meaning of, and the Petitioner's interpretation of, the cases requiring that the highest court of the state determine all necessary issues before a writ of certiorari can correctly be made to this Court.

Since the issues of subject matter jurisdiction and denials of due process and other constitutional infirmities were not addressed by either the Appellate Division or the Court of Appeals, the Petitioner had no procedural right to bring on a writ of certiorari to this Court.

It is the very essence of the finality doctrine that precluded the Petitioner from a direct route to this Court, since the decision appealed from was from an intermediate State Appellate Court, namely, the Appellate Division, Second Department of the Supreme Court of the State of New York, which itself did not address the issues of its own subject matter jurisdiction and denials of due process and other constitutional infirmities. This Court, in the case District of Columbia Court of Appeals v. Feldman 460 U.S. 462,

476 (1983) was asked to sit in review of a final judicial decision of a state court. Such is not the case here. In addition, the Petitioner argues that Federal Court review final highest state court decisions in many kinds of cases, especially where equitable relief is requested, such as in Habeas Corpus, Injunction, discrimination, voting, and environmental cases, The Federal Courts have the power to review State Court disciplinary proceeding and decisions when the State Court procedure is wanting in due process, Matter of Gordon, 640 F.2d 1143, or when violative of 42 U.S.C. §1983, Getty v. Reed, 547 F.2d 971. Rosenthal v. Justices of the S. Ct. of California, 910 F.2d at 564, citing Kruso v. Int'l Telephone and Telegraph Corp., 872 F.2d 1416, 1421 (9th Cir. 1989).

The label, whether it be civil, criminal, quasi criminal, is not determinative of whether review is granted, In re Daley, 549 F.2d 469, 474-477 & n.6 (7th Cir.), cert. denied 434 U.S. 829 (1977).

The Petitioner contends that substantial federal questions existed then, and continue to exist now, unanswered by any court below. Among them are the basic fundamental concepts of the right to be tried by a tribunal constitutionally or statutorally empowered to hear and determine the issues concerned with the matter before it, since there is no presumption of jurisdiction with respect to inferior courts of limited jurisdiction, Smith v. Central Trust Co., 154 N.Y. 333, 48 N.E. 553; Steinhardt v. Baker, 163 N.Y. 410, 57 N.E. 629, the right to discovery in a proceeding that could and did result in the loss of the Petitioner's livelihood and license to practice law, the right to a jury trial on the issue of the value of one's legal work, labor and/or services, the right to confront and cross-examine court ordered subpoenaed witnesses and documents in a proceeding termed quasi-criminal in nature, the right and opportunity to confront court ordered subpoenaed adverse witnesses who have been permitted by the State without appearance to offer adverse affidavits without cross-examination.

Both the questions of the finality of the state decision and the underlying authority of the state court to hear and determine the issues before a court of limited jurisdiction distinguish the facts of the instant case from the Feldman case, supra. No formal appeal on the merits was ever decided because both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeal of the State of New York denied the Petitioner leave to appeal. The Petitioner was foreclosed from any higher appellate review. Both the state courts and the federal district court had the issue of the subject matter jurisdiction of the Appellate Division of the Supreme Court of the State of New York to evaluate the nature and extent of an attorney's fee within the construct of a Grievance Committee disciplinary proceeding. Each court failed to evaluate and decide that critical issue. In such an instance, when critical issues are left undecided, the Petitioner may not ask for a writ of certiorari from the Supreme Court of the United States nor may the Petitioner appeal to that Court because it is considered a nonfinal decision of a lower State Court, Collins v. Miller, 252 U.S. 364, 370 (1920), Houston v. Moore, 3 Wheat. 433, 434 (1818). It is nonfinal in so far as it did not reach critical issues that could have dictated an opposite result, San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621,632-33 (1981), Whitney v. California, 274 U.S. 357, 360 (1927).

In the instant case, the federal district court had jurisdiction to issue an injunction to stay enforcement of the decision and order of the Appellate Division of the Supreme Court of the State of New York. The Feldman case, supra does not foreclose the Petitioner from access to the federal district court where a nonfinal decision of an intermediate state appellate court has effectively deprived the Petitioner of his rights protected by the 5th, 14th Amendments to the Constitution of the United States, 42 U.S.C. § 1983, and to the right to trial by jury protected by the New York State Constitution under N.Y.S. Const. of 1894 Art. VI §§ 1, 2, 4k, New York State

Constitution Art. 1 § 2, 1848 N.Y. Laws, ch. 3791876 N.Y. Laws, ch. 448.

On page 8 of its brief the Respondent cited Theard v. United States, 354 U.S. 278, 281 (1957) for the proposition that "Suspension by a federal court does not automatically flow from suspension by a state court."

Theard, a practicing attorney in Louisiana, was convicted of forging a promissory note there, and disbarred by the State Court. The federal court likewise disbarred him based on the basis of the state decision. This Court, relying on Selling v. Radford, 243 U.S. 46, 50 (1917) reviewed the facts and the law, deemed the district court's reliance on the state decision error, and remanded the matter to the federal court for further proceedings in accordance with the standards defined in the Selling case.

One problem with reliance on Selling is that the federal court proceeding emanates from a state criminal conviction by a jury. There was no issue of subject matter jurisdiction. Reliance of one court's decision by another court must first determine if the court relied on had the authority to make the decision. Then and only then does the "determination of course brings title deeds of high respect. But it is not conclusively binding on the federal courts", (at page 282 of Theard) . The Petitioner herein was never afforded the standard set in the Selling case.

In Radford case no one ever challenged whether the Michigan State Court had subject matter jurisdiction to determine the issues necessarily decided therein. Such is not the case herein. Radford had been disbarred by a Michigan court for committing a "moral wrong" which was reviewed and approved by that state's highest court, the Michigan Supreme Court, in a certiorari proceeding.

In Petitioner's case there has never been a specific finding of any moral wrong committed by the Petitioner by any court, state or federal. In the Petitioner's case the highest court never decided or

reviewed the issues presented on the merits, nor did it ever make a specific finding of any moral wrong committed by the Petitioner.

On page 8, the Respondent also cited a portion of the Selling case which is essentially the same as Rule 4(g) of the Rules of the Eastern District Court For New York. Rule 4 states in pertinent part:

> Discipline may be imposed by this court with respect to paragraphs (d) and (e) unless the member of the bar concerned establishes by clear and convincing evidence: (1) with respect to paragraph (d) that there was such an infirmity of proof of misconduct by the attorney as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion of the other court; or (2) that the procedure resulting in the investigation or discipline of the attorney by the other court was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (3) that the imposition of discipline of this court would result in grave injustice.

This is exactly what the Petitioner demonstrated to the courts below, both in the Petitioner's response to the district court' order to show cause and to the advisory panel at the conferences.

Specifically, the record in the State proceeding below showed that over the Petitioner's continuing objection 1) the Petitioner was not permitted to enter into evidence an authenticated tape recorded conversation of the complainant to impeach the complainant during cross-examination of the complainant, 2) the Petitioner was denied the opportunity to use tape recorded conversation during cross-examination of the complainant, 3) the referee refused to recall the complainant for further cross-examination when the authenticated tape recorded conversation of the complainant was entered into evidence at the conclusion of the

hearing, 4) the referee used as part of his decision making process the content of an affidavit of a hostile witness who did not appear and was not subject to cross-examination, but who was Court ordered to appear to testify and to produce his books and records, 5) the Petitioner was not given notice of the state's intention to refer to, include or use as a measure of the discipline to be imposed, the prior acts of the Petitioner that were the subject of prior discipline, 6) the Petitioner was not afforded an opportunity to explain or confront the issues raised by these prior acts during the hearing, 7) the Referee completely, arbitrarily and without support in the record eliminated all the value of the legal services Petitioner rendered to the complainant in the family court proceedings, 8) the Petitioner was not afforded an opportunity for any discovery prior or during the hearing, 9) the signed and acknowledged promissory notes were declared void without any showing of fraud, misrepresentation or overreaching, 10) the confessions of judgment of record were vacated by a court of limited jurisdiction without authority of law and without any showing of fraud, misrepresentation or overreaching and 11) there were no facts in the record to demonstrate that the statement in one judgment absolving the Petitioner from liability had anything to do with limiting the Petitioner's liability for his acts or omission in representing the complainant.

There is the additional matter that occurred during the state proceeding when the Petitioner tried to initiate reconsideration of the referee's findings. Justice Vincent Balletta, was assigned by the Appellate Division Second Department of the Supreme Court of the State of New York to review the Petitioner's application for reconsideration. Justice Balletta called a conference at which the chief prosecuting attorney for the grievance committee, Robert P. Guido, Esq., the Petitioner and the judge's own law secretary were present. At that conference, during the time the Petitioner was explaining why he application should be granted, Justice Balletta

reached into his desk drawer and removed a file and began reviewing it. The Petitioner asked if the papers in the file were related to this matter. The Judge replied that it was a dossier on the Petitioner. The Petitioner asked if he could see the information that the judge was studying. The judge said no. The Petitioner asked if the information was part of the record in the Petitioner's disciplinary matter. The judge responded that, "No, files like this one are kept on many attorneys. This is the one on you." The Petitioner then asked if the information that was in the dossier would be used as part of the decision on the Petitioner's application. The Judge said that after reading the file he was not likely to overturn his "brothers". Neither the chief prosecuting attorney, Robert P. Guido, Esq., nor his own law secretary made any comment regarding the dossier or the judge's actions. The judge wrote "denied" on the application as we sat there.

These restrictions, violations of Petitioner's rights to due process in presenting his own defense and the sheer impropriety of the actions taken below raise the very items that were set forth in paragraph (g) of Rule 4. Underlying these factors, however, is the claim that the Federal Grievance Committee Proceeding could not rely on a state court that did not have subject matter jurisdiction to hear or decide the issues decided .

The Respondent cited In re Snyder ,472 U.S. 634, 643 (1985), Curry v. Del Priore, 941 F.2d 730, 731-732 (9th Cir. 1991) (citing Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978); Pfeifer v. Sentry Insurance, 745 F. Supp. 1434, 1443 (E.D. Wis. 1990); Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331, 334 (Iowa 1980) as authority for the proposition that:

"Courts have long recognized an inherent authority over the conduct of attorneys who practice before them, which authority derives from the lawyer's role as an officer of the court which granted admission. Based upon that inherent authority, courts have also held that they have authority to protect a client from excessive legal fees."

These cases have nothing whatever to do with the inherent authority of a court of limited jurisdiction to hear and determine the quality, nature, extent and value of an attorney's legal services or for that court to delegate this responsibility to a referee within the construct of a grievance committee disciplinary proceeding.

The Snyder case dealt with an attorney who was appointed to represent a defendant in a federal district court criminal proceeding. The controlling federal statute required the judge hearing the case to review and approve expenses for compensation in excess of $1,000.00, 18 U.S.C. §3006A (d)(3).The bill submitted was for $1,796.05. This case specifically refers to the controlling statute conferring jurisdiction on the Court to do the very thing the Petitioner is complaining is absent in his case. This part of the Snyder case has nothing to do with a court's "inherent authority." The Respondent took part of the first paragraph on page 643 and combined it with a part of the Curry case to produce a statement to be relied on by this Court. To use this case for that proposition is clearly misleading. The part of the disciplinary side of the Snyder case properly reflects the position of the Court as seen on page 642, beginning, " The gravamen of the situation is that Snyder in his letter of October 6, 1983 became harsh and disrespectful to the Court."

The Respondent cited the Curry, Coffelt, Pfeifer and Wunschel cases as authority for the Court's "inherent authority" to protect a client from excessive legal fees. None of these cases apply the concept of "inherent authority" for this purpose.

The Curry case was concerned with a federal district court, that while in the course of ongoing litigation before it as a trial court, took "ancillary jurisdiction" to resolve a fee dispute between the plaintiff and the defendant. In that case the conflict arose during the trial when counsel for the defendant moved the court to

withdraw as counsel. It was then that the sitting court took "ancillary jurisdiction" to decide the issue of his attorney's fee.

This is the reverse of what happened to the Petitioner herein. When the Petitioner applied to the trial court which had jurisdiction over the matrimonial action to settle the question of Petitioner's legal fee, the trial court declined, stating that the matter was then before the grievance committee. In the Petitioner's case the very court with jurisdiction to hear the issue (ancillary jurisdiction) refused in deference to a quasi-judicial body which had no subject matter jurisdiction over the matter of evaluating the Petitioner's legal fees.

In the Pfeifer case the defendant asked the trial court to determine reasonable attorney's fees in response to the bill submitted by a group of attorneys in the case during the litigation.

Again, this has nothing to do with "inherent authority" of a court. In Pfeifer the parties voluntarily submitted the question to the court before whom they had submitted the entire controversy. In Petitioner's case the power of the state was brought to bear on an involuntarily subject who objected to the entire proceeding. This case is again authority for "ancillary jurisdiction" not for the proposition suggested by the Respondent.

In the Wunschel case the issue was whether the court should approve contingent attorney fee contracts for the defense of unliquidated tort damage claims. This court held that attorney's fees were to be tried at a court of law. The court said that the evidence in the case was to be viewed in its light most favorable to the judgment. This case, again, doesn't stand for the proposition of "inherent authority."

In the Coffelt case, the trial court disqualified an attorney because of a conflict of interest and reduced his fee from $1,000.00 to $100.00 based on what the court perceived as fairness and equity because of the early termination of the proceeding and the attorney's obvious lack of preparation for trial. This action was taken by the district court that had subject matter jurisdiction over

the criminal trial. The Respondent again confuses ancillary jurisdiction with inherent authority.

All of these cases cited by the Respondent deal with trial courts and their jurisdiction within the confines of the litigation before them to determine the participating fees of the attorneys representing the parties. They have nothing to do with the authority of a court of limited jurisdiction to hear and determine the quality, nature, extent and value of an attorney's legal services, or for that court to delegate this responsibility to a referee within the construct of a grievance committee disciplinary proceeding.

On page 10 the Respondent cited Gair v. Peck, 160 N.E.2d 43,51, 53 (1959) for the proposition that "the Appellate Division's authority extends to legal fees charged by members of the New York Bar; and the idea is frivolous that the disciplinary authority over attorneys is unrelated to the exaction of excessive fees." The problem is that the Respondent didn't clarify what the Court's holding was or its basis.

The Gair case dealt with the rule making power of the Court to promulgate a rule setting forth the boundaries of contingent fee agreements between attorneys and their clients in tort negligence cases. At the top of page 113 the Court said,

> "Moreover, what is of utmost importance, these schedules are merely presumptive of what constitutes an exorbitant fee in a particular case. The way is left open in any case to an attorney to come into court on the full showing of all the facts and circumstances, with an opportunity to establish that these prima facie percentages do not indicate correctly that the stipulated contingent fee in this case is unlawful due to being unconscionable... that is to say, whether it is such an amount as to be collectible *in an action between attorney and client on the contingent fee retainer agreement*... The matter here claimed to be wrong about the rule is that it calls upon the lawyer to make this showing (if his contingent fee exceeds the

scheduled percentages) before rather than after collection of the fee."

The Court specifically said that the attorney is entitled to an action at law to determine the amount of legal fee. The Court also held that it may not make a rule that by its operation changes the substantive law of the State. This is consistent with the propositions and holdings of the New York Courts, namely that an attorney's claim for work, labor and services was, and is, enforceable by a suit at common law, for money damages only, called Assumpsit, now called Breach of Contract, Lynn v. Agnew, 179 A.D. 305, 166 N. Y. S. 274, judgment affirmed Lynn v. McCann, 123 N.E. 877, 226 N.Y. 654, Stevens & Cagger v. Adams, 23 Wend. 57, affirmed Adams v. Stevens & Cagger, 26 Wend. 451, Spencer v. Bush, 98 N.Y.S. 690, Werner v. Knowlton, 94 N.Y.S. 1054, 107 A.D. 158, Greenberg v. Jerome H. Remick & Co., 129 N.E. 211, 230 N.Y. 70, reversing judgment 181 N.Y.S. 987, 191 A.D. 947. That, as a matter of history and legal precedent, the issues of controverted fact within this claim were entitled to be tried and determined before a jury as a matter of right, Ward v. Orsini, 152 N.E. 696, 243 N.Y. 123, Werner v. Knowlton, supra, Steele v. Hammond, 121 N.Y.S. 589, 136 A.D. 667, Everitt v. Mitchell, 202 N.Y.S. 260. To the same effect is Ex Parte Wall 107 U.S. at 288, in which the Court said "... The action of the court within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practiced from time immemorial. Conceding that an attorneys calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration."

The Petitioner does not take issue with the power and authority of the Appellate Division of the Supreme Court of the State of New York under section 90(2) of the Judiciary Law to have original jurisdiction to discipline attorneys. That is the clear

mandate of the statute. Nor does the Petitioner contend that section 474 of the N.Y. Judiciary Law insulates attorneys from disciplinary examination, in appropriate circumstances. See Respondent's brief note 7., page 10.

What the Petitioner contends is that before the Appellate Division can assume jurisdiction pursuant to section 90(2) over the attorney based on a charge of an excessive fee, the attorney is entitled to have his attorney's fee evaluated by a trial court at law with all the protections heretofore afforded such actions at law. The New York State Appellate Division put the cart before the horse. It has no authority to do the evaluative process within the proceeding to discipline. No case or other authority has been found in either the state digests or federal digests by this Petitioner or within the borders of the Respondent's brief to stand for the Respondent's view.

The Petitioner asserts that the State of New York, its political subdivisions, agents of the Committee and the Appellate Division were without constitutional and statutory authority deciding or in delegating to a referee, holding a hearing, determining controverted issues of fact concerned with evaluation of attorney's fees within the construct of a disciplinary grievance committee hearing, and punishing the Petitioner, as a result of their findings. The Petitioner takes the position that the Federal Grievance Committee decision was also void because it was based on a void decision of the State appellate court and in contravention of the Petitioner's due process rights to an adversary proceeding. Similarly, the Petitioner takes the position that he was deprived of his liberty without authority of law.

A disciplinary hearing is an adversary proceeding. It is criminal in nature since it involves the loss of livelihood, In re Ruffalo, 390 U.S. 544, 551. Any ambiguity or doubt must be resolved in favor of the attorney who is the subject of the disciplinary hearing, Erdmann v. Stevens, 458 F.2d 1205, Rosenthal v. Justices of the S. Ct. of California, 910 F.2d at 564,[6,7].

The Respondent cited United States v. Zucker, 161 U.S. 475, 481 (1896) and Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 564-565 (9th Cir. 1990), In re Daley, 549 F.2d 469, 474-477 & n.6 (7th Cir.), cert. denied 434 U.S. 829 (1977), as authority for the proposition that an attorney Federal Disciplinary Proceeding is not a criminal prosecution and neither the Fifth, Sixth, or Seventh Amendments apply, Minneapolis & St. L R.R. v. Bombolis, 241 U.S. 211, 217 (1916).

The Zucker case dealt with the issue of the admissibility and use of a deposition taken in Paris, France of a witness against the defendant in a civil action in the United States. The Court said that since the action was civil and not criminal, neither the Fifth nor the Sixth Amendment attached. This is a far cry from what happened in the Petitioner's State Proceeding. In Petitioner's case the referee, over the Petitioner's objection, used, as part of his decision making process, the content of an affidavit of a hostile witness, who did not appear, and was not subject to cross-examination, but who was Court ordered by this very referee's "So Ordered" Subpoena to appear to testify and produce his books and records. Note 8 at the bottom of Respondent's brief on page 12 is completely misleading and erroneous. The record of the State Proceeding demonstrated that the referee did not permit the Petitioner the use of the transcript of the complainant's tape recorded statements to cross-examine her while she was present. Furthermore, when, at the close of the hearing, the referee permitted the tape to be entered into evidence, the complainant had already been excused and the referee refused over Petitioner's objection to recall her.

In the Federal Grievance Proceeding the "Advisory Panel" never granted the Petitioner a hearing, no witnesses were called, no testimony taken and no records entered into evidence. There was no one present for the first two meetings except the "panel and the Petitioner. It wasn't an adversary proceeding. There was no adversary present, except possibly the Advisory Panel itself. In the Petitioner's case he was not given notice of the state's intention to

refer to, include or use as a measure of the discipline to be imposed, the prior acts of the Petitioner that were the subject of prior discipline nor was the Petitioner afforded an opportunity to explain or confront the issues raised by these prior acts during the hearing. In the Federal Grievance Proceeding the "Advisory Panel" simply referred to all of the criteria that the Petitioner objected to in the State Proceeding and incorporated them without scrutiny or test.

In the Daley case the issue of enforcing an injunction arose with respect to the testimony of a defendant and dealt specifically with the issue of self-incrimination (Fifth Amendment) by a defendant. The defendant was promised immunity if he testified in the Federal Court. Later the State wanted to use his Federal Court testimony in a State Disciplinary Proceeding against him. The Court said that the label of a proceeding, whether civil or criminal doesn't control. Page 476 of the opinion the reflected that the Court of Appeals refused to intervene in the State Disciplinary Proceeding because of the gravamen of the State's interest. It said the Court should be slow to intervene (p.476). It permitted the use of the testimony because it said the grant of immunity was beyond the power of the Federal Prosecutor. This case certainly demonstrates that the Court took jurisdiction of the issues presented, decided that it can enjoin enforcement of a State Court Order, decide the issue of jurisdiction of the Federal Prosecutor and consequently decide issue of enforcement of the State Court Order. The power or authority to grant the immunity has to come from the legislature. In this case there was no authority granted tot the Federal Prosecutor. In the Petitioner's case there was no authority granted to the Appellate Division of the Supreme Court of the State of New York.

In the Bombolis case the issue was whether the Seventh Amendment applied to the State Legislature and to the conduct of the state court in enforcing a trial at law of the State?

In Petitioner's case the complaint is not only that the State of New York violated the Petitioner's rights under its own Constitution, but that the Federal Grievance Proceeding did not afford the Petitioner a trial by jury on the issue of his attorney's fee. It is Petitioner's position that 1) the Federal Grievance Process cannot rely on a decision of the State that denies the Petitioner his right to a jury trial under its own (State) constitution, 2) once the Petitioner challenges the subject matter jurisdiction of the Court relied on by the Federal Grievance Committee, the issue of subject matter jurisdiction must be determined before the Selling case or any other case becomes applicable.

On page 13 the Respondent cited Williams v. New York, 337 U.S. 241, 245-247, 250-251 (1949) and Nichols v. United States, 114 S.Ct. 1921, 1927-1928 (1994) as authority for the proposition that it was correct for the State and Federal Grievance Courts to consider three prior incidents of discipline in ordering the Petitioner's three year suspension from practice.

In the Williams case the defendant was charged and convicted by a jury of murder in the 1st degree. The Court considered information as to his prior criminal record in the sentencing proceeding without the defendant examining any witnesses on the subject. The Judge then, pursuant to the authority granted the Judge by statute, modified the jury's recommendation of life imprisonment to death..

The Court however, at page 244 of the opinion stated that the judge enumerated and referred to the defendant's past criminal experiences as brought out by the probation department's report and gave the defendant an opportunity at the sentencing hearing to refute, explain, discredit or challenge them by cross-examination or otherwise. Neither the defendant nor his counsel took advantage of that opportunity to challenge the report nor was the judge asked to disregard any of them.

In the Petitioner's case no such opportunity was provided for and no notice of intent to include Jacobs' prior incidents was provided.

Here the Respondent used prior criminal convictions or prior criminal behavior. It didn't seem to be incongruous to the Respondent that if its position is that Grievance Committee Proceedings are not criminal, then why cite criminal cases as precedent and controlling authority?

This tact seems not only incongruous to the Petitioner, it is clearly and unmistakably misleading and erroneous. In the first place the idea of being apprised in advance and an opportunity to be heard on the matters to be considered go to the heart of the matter. Contrary to the Respondent's note 9. at page 14 of its brief the case of Sexton v. Arkansas Supreme Court, Comm. on Professional Conduct, 730 F. Supp. 285 (W.D. Ark 1990) is completely adverse to what the Respondent suggests. The Court's opinion at the bottom of page 286 stated specifically,

" An attorney in disciplinary hearings is 'entitled to procedural due process, which includes fair notice of the charge,' citing In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 1225, 20 L.Ed.2d 117 (1968).

It follows from this that if defendant considered a prior disciplinary action against plaintiff in its decision, it should have notified plaintiff that such misconduct would be considered. Thus, the question presented is whether, as a factual matter, received such notice." The Court went on to decide that he actually received such notice during the disciplinary hearing.

No such information was conveyed to the Petitioner herein. The Petitioner did not know at any time during the disciplinary hearing that any prior disciplinary action would be before this referee or the Court in consequence of the present disciplinary action. That is the reason no objection was made on the record during the hearing.

The Respondent brief at page 14 begs the question revealed by the Sexton case. It is not that the Petitioner did not claim that he was not the subject of the prior disciplinary actions taken. The issue is notice in advance or contemporaneously with the grievance disciplinary proceeding that Sexton talks about.

Furthermore, the record in Petitioner's case does reflect, as the Sexton case pronounces at page 288-289, that the refusal to permit the Petitioner discovery did "alter the rules of evidence and required less or different testimony in order to convict the offender." The Petitioner argues that when the evidence, by which guilt or responsibility can be refuted, is at the door and has been ordered to be brought in for review by the referee, the refusal by the referee to open the door or have it opened produces 14th Amendment violations of due process. Here Dominick Pelle, Esq. represented the husband in both the Matrimonial and the Family Court proceedings. He and his business records listing the time, place, hours and charges in connection with the Matrimonial and the Family Court proceedings were critical information to the Petitioner who could obtain such information from no other source. Both Mr. Pelle and the Petitioner were in the same Courts at the same times for the same reasons representing adverse parties. These records would have substantiated and proven the critical times that the Petitioner was in Family Court conducting hearings that amounted to approximately 40% of the fees charged. The only other evidence that the Petitioner had to offer were his notices of appearance, which indicated the place, date and the time of arrival in Family Court on the complainant's matters, but did not reflect the time departure from Family Court. The Petitioner's testimony as to this was completely discounted by the referee. In consequence none of the time expended on six family court petitions for the complainant was counted towards the Petitioner's total time expended on complainant's matters so as to justify he legal fee charged but never collected. The Nassau Family Court Records were in evidence but did not state the number of hours that legal

services were performed for the complainant. The Petitioner reasonably believed and in good faith requested the referee to subpoena Mr. Pelle and his records. This was done. However, when the critical time came to produce Mr. Pelle the referee accepted his affidavit in lieu of individual testimony and review of the records. The Petitioner reasonably believed in good faith that Mr. Pelle' records would have shown the missing information. This information it is believed would have altered the basic facts of the case.

The Petitioner was likewise denied the opportunity to examine Mr. Pelle or his records in the Federal Grievance Proceeding.

The Petitioner argues that when the State or the Federal Government initiates a proceeding which can result in the 1) loss of livelihood, 2) separation from society, colleagues and friends by stigmatizing the individual, 3) loss of property or interest therein, or at least modify the individuals contract rights through a loss of status, 4) restrict his employment opportunities, the individual has been subjected to nothing less than what has been historically a penal proceeding and penal penalties. The whole purpose of the State or Federal Disciplinary Proceeding is to protect the public and vindicate the State. At the very time that his life and his family economic survival are put at risk, the very people who are initiating the proceeding remove the safeguards of the Fifth, Sixth, Seventh, Eight and Fourteenth Amendment protections. It is the Petitioner's contention that the penalty exacted from the Petitioner were and are continuing to be so overwhelmingly disproportionate compared to acts found to have been omitted by the Petitioner that as a matter of law the discipline imposed amounted to a criminal penalty of such magnitude as to violate the Petitioner's Eight and Fourteenth Amendments. When the power of the government brings to bear its weight and can destroy a citizen's life, without these basic protections the proceeding is more akin to a Star Chamber Proceeding than to a balanced method for adjudicating the truth.

The Petitioner claims that the Appellate Division of the State of New York did not have subject matter jurisdiction within the construct of a Grievance Committee disciplinary hearing and/or without a prior trial by jury in a Supreme Court Trial Term to 1) determine the Petitioner's right to a specific sum for work, labor and services performed, 2) direct the Petitioner to vacate judgments of record, 3) punish and penalize the Petitioner by bringing about a forfeiture of the Petitioner's law practice (approx. 80 civil cases in progress) and/or 4) prevent the Petitioner from obtaining employment in any category or subcategory of work in the law field.

CONCLUSION

The Petition for a writ of certiorari shaould be granted.

August 28, 1995

Respectfully submitted,

DAVID B. JACOBS